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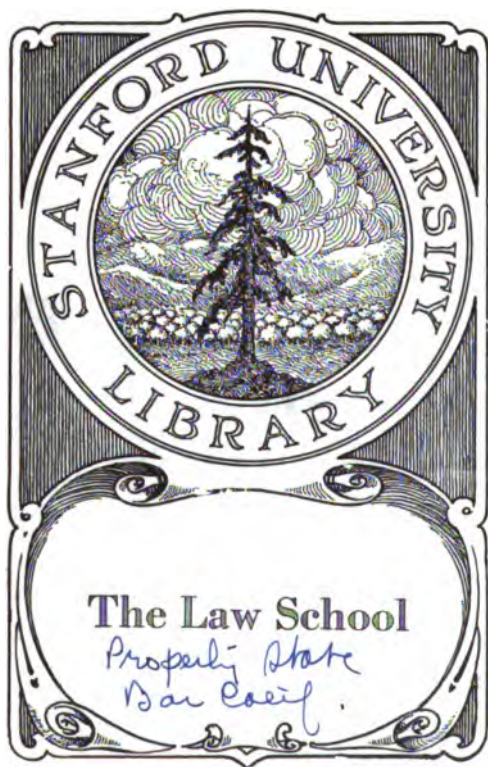
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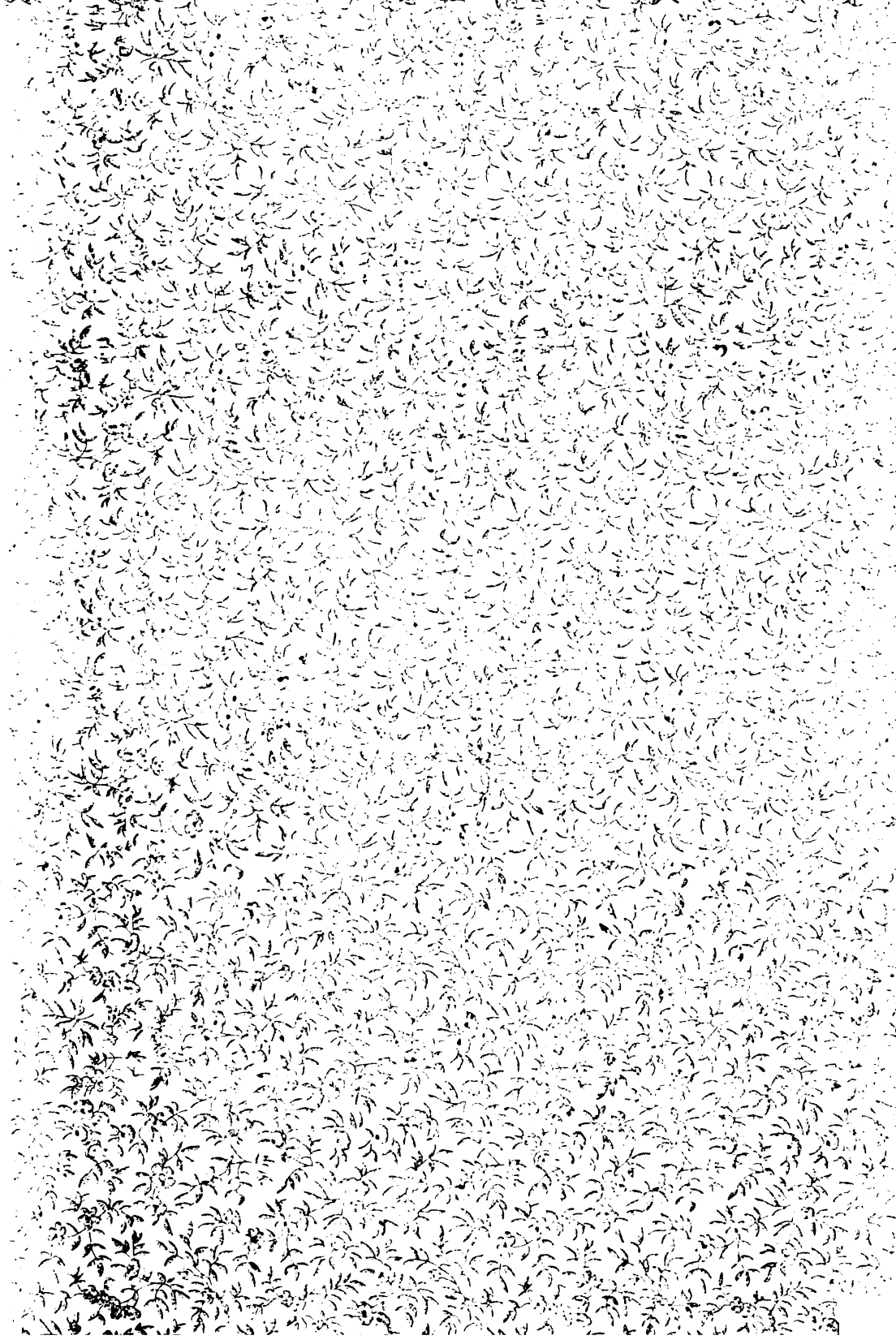
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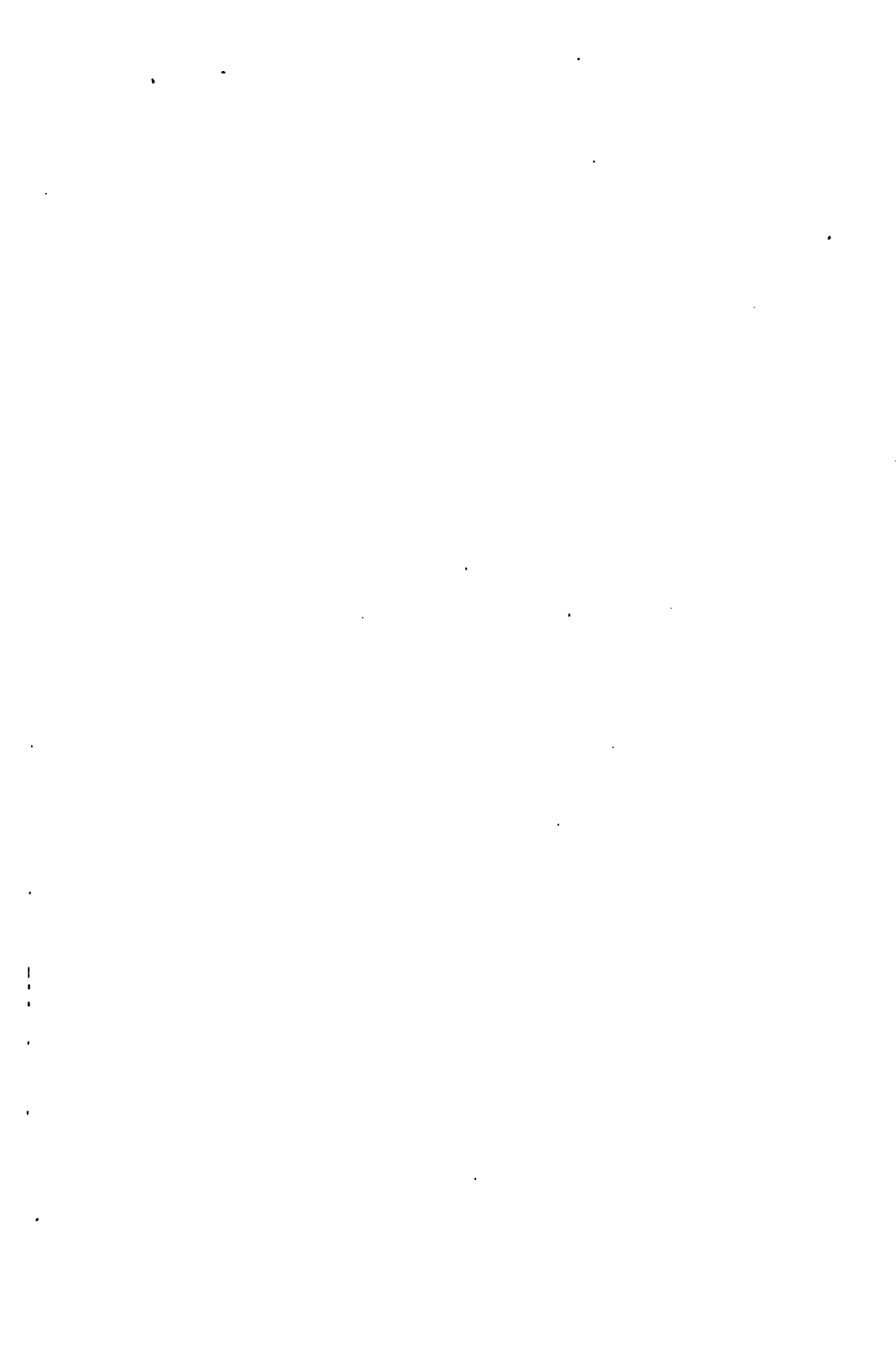
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PROCEEDINGS
OF THE
JUNIOR SESSION AND SEPARATE SESSIONS
OF THE
ASSOCIATION OF ARKANSAS
AND THE
TEXAS BAR ASSOCIATION

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PROCEEDINGS

OF THE

JOINT SESSIONS OF THE BAR ASSOCIATIONS OF ARKANSAS AND TEXAS

AND OF THE

**SEPARATE SESSIONS OF THE BAR ASSOCIATION OF ARKANSAS AND
OF THE TEXAS BAR ASSOCIATION**

HELD AT

TEXARKANA ON JULY 10, 11 AND 12, A. D. 1906

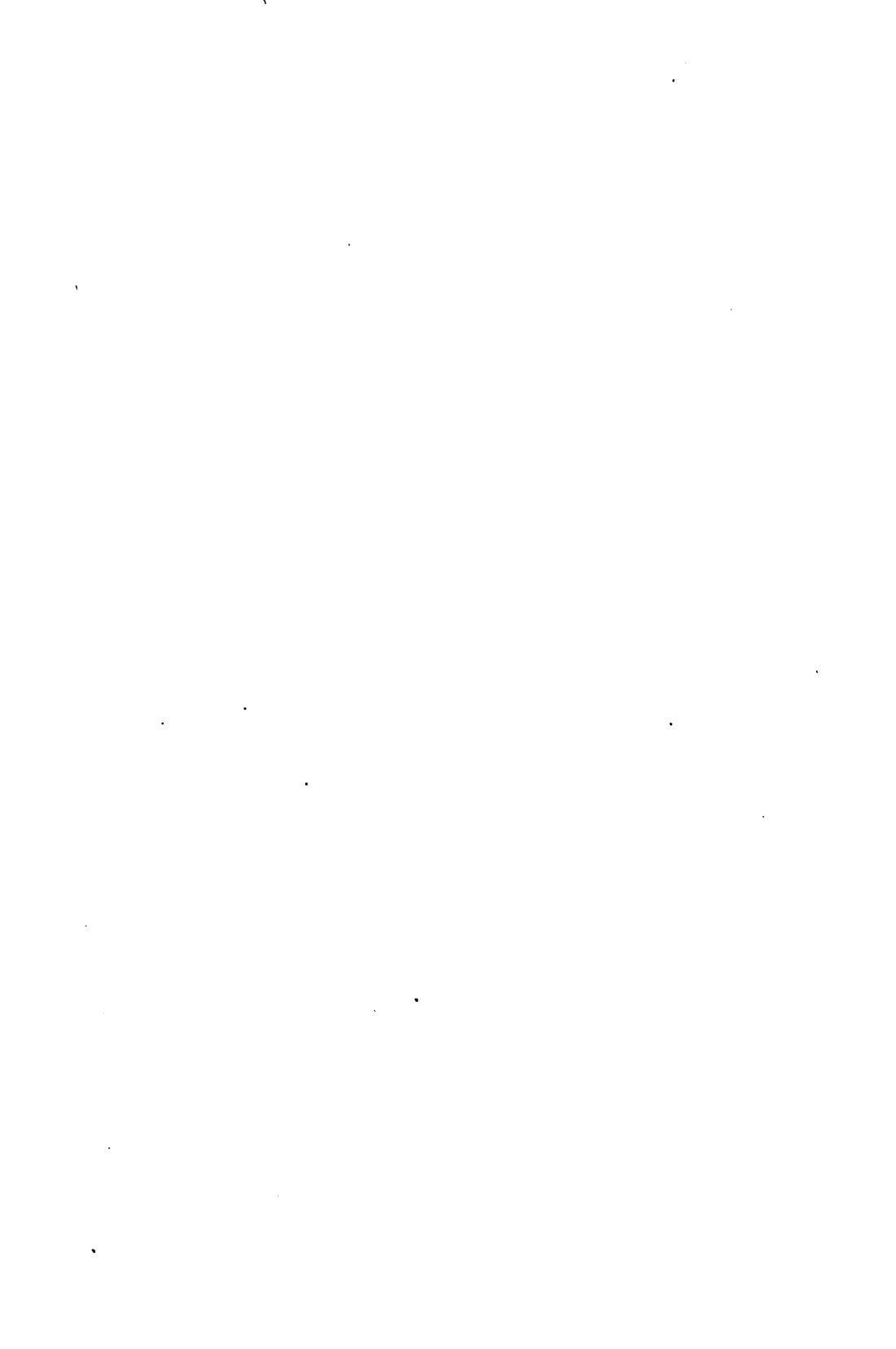
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PROCEEDINGS
OF THE
JOINT MEETING OF THE BAR ASSOCIATION OF ARKANSAS
AND THE TEXAS BAR ASSOCIATION,
HELD AT TEXARKANA, JULY 10, 11 AND 12, 1906.

FIRST DAY.—MORNING SESSION.

The Bar Association of Arkansas and the Bar Association of Texas met in joint session at the courthouse of Miller county, Arkansas, on July 10, 1906.

The Associations were called to order at 10 o'clock a. m., Hon. Joseph M. Stayton, President of the Arkansas Association, and Hon. H. M. Garwood, President of the Texas Association, jointly presiding.

The proceedings were opened by an invocation of divine blessing by Rev. Jas. Thomas, of Texarkana, Ark.

President Stayton introduced to the audience Hon. W. H. Arnold, of Texarkana, Ark., Vice-President of the Arkansas Bar Association, who delivered the following address of welcome:

Messrs. President and Gentlemen of the Arkansas and Texas Bar Associations:

The members of the Bar Associations of Arkansas and Texas embrace a fair representation of the leaders of thought in every community, town and city of these two great commonwealths. No more appropriate place for the joint meeting could have been selected than Texarkana, equally divided by the State line. Texarkana is one of the highest products of the marvelous growth of these two great States in the last few years; and being new, it en-

joys all the advantages of modern civilized life. It is in the lead in the lines of manufactories, business, education and churches, and is a standing advertisement of what may be accomplished by the united efforts of its people.

We have two cities of the first class under separate municipal governments, one on either side of the line, bearing the same name, and they are free from petty jealousies usually incident to neighboring towns. You will find here a united people in every effort for the general good and for the upbuilding of Texarkana. Our city is growing faster than at any period of its young and active life, has doubled its population in the last six years, now exceeding 20,000 inhabitants, and with its splendid railway facilities to every point of importance in Arkansas and Texas, it is now prepared to begin its natural career of supplying the wholesale trade of the two States. It is customary to tender the keys of the city to its invited guests as the highest compliment that can be paid, but we offer the keys of two cities—one on the Arkansas and the other on the Texas side of the line—will full assurance that each possesses advantages not known to any other city or town in either State, one of which is the ease of crossing the State line in the event of trouble. This answers the question asked us at Dallas, why we did not get on one side of the line or the other. Owing to the dual nature of our city, we always give our guests a double portion; so we would have you bear in mind that when you are asked to take one, that it means two. I feel constrained to remind you that, should the vision of anyone become affected, as when one object appears to be two, do not be alarmed, because that phenomenon is often noticed here with those who have come from the prohibition districts.

The invitation to meet in Texarkana was not only extended by the united bar of our two cities, but by its business men, who fully realize the honor as well as the great advantage that will be gained by reason of this great meeting, and we will express our appreciation of your visit by our efforts in the entertainments which are to follow.

The idea of calling a joint bar association meeting at Texarkana originated with the lawyers of our city, and there was no difficulty in getting the members of the Bar Association of Arkansas to join heartily in the movement, and as soon as the invitation was extended to the Texas Bar Association, all cities and towns in Texas at once withdrew their applications for the privilege of having the Bar Association of that State to meet with them and united in the petition to have a joint meeting at Texarkana. There is a reason for such unanimity of action. Texas owes as much to the State of Arkansas as any other State for its splendid citizenship, without regard to the profession or employment. The people who have changed their citizenship from Arkansas to Texas are without number, and there is hardly a family in this State that has not one or more members located in Texas. Nearly every citizen of Arkansas has living or buried within her hospitable bosom a father, mother, brother, sister, or some one related in a near degree, and there is a closer affinity, perhaps, between these than any other States in the Union. The kinship and friendship already existing will be cemented more by this meeting than anything that has occurred in the history of the States. There are many of Arkansas' sons who have sought honor at the hands of the people of Texas and have been honored with some of the most important offices of that great State. Many Texas district judges were born and reared in the State of Arkansas; many of its foremost lawyers; many of its greatest farmers, artisans and mechanics trace their history back to the great State of Arkansas, and, true to the home of their childhood and youth, they have always admitted in public that they are of Arkansas extraction and at times (since the sixshooter has become obsolete in Texas) have been compelled to defend their origin in physical contests. Of course, I do not care to account for those who left Arkansas because the sheriffs were becoming too numerous.

But there is no reason now, if it ever existed, why the great State of Arkansas should not occupy, as it does, one of the first places in the galaxy of great States. Beginning with the Civil

War, it had only thirty-eight miles of railway, but now it has in active operation 3240 miles, opening up a country as fertile and rich in soil, timber and minerals as can be found on the face of the earth; and, beginning with a farming acreage of 1,700,000 in 1861, it now has in cultivation 7,000,000 acres owned by the heads of families; and the attractions of Arkansas can be mentioned in no better way than to refer to the fact that her population of a million and a half at present is three times what it was in 1870, notwithstanding the fact that it has gone far towards building up the great State of Texas. The advantages of Arkansas equal and excel that of many States of the Union. Her area is greater than that of Pennsylvania or New York or Ohio, and there appears to be no reason why it should not become equally as great in material and commercial advancement.

But when we come to consider the fact that many of the lawyers present have traveled almost a thousand miles from points in the State of Texas to attend this Bar Association, the vastness of that great empire begins to be partially realized. We can not understand the greatness of Texas by the usual methods of comparison, because there is no other State or country on earth that can be compared with Texas without being swallowed up. No other State will compare with it in area or in the quality or quantity of its soil or the varieties of its products and climates. It has been said that it is bounded on the east by the rising sun; on the west by the Pacific Ocean; on the north by the Aurora Borealis, and on the south by the Day of Judgment. This estimate does not seem extravagant when we consider that by the time you travel as far as Dallas or Fort Worth, you will only just begin to enter the State, that it is farther to El Paso than to Chicago, and that the area of Texas is greater than that of the six States in New England combined with Ohio, New York, Pennsylvania, and Illinois, leaving still enough territory to make a very important State.

No mention should be made of the greatness of Texas without also referring to its wonderful history. The names of Travis, Bowie, and Crockett stand out as prominently in modern history as those of Diomed, Ajax, and Ulysses in antiquity. The names

of these great heroes and those who died with them at the Thermopylæ of America, together with Sam Houston and his compatriots, who struck the supreme blow for the liberty of Texas at San Jacinto, are lodged in the hearts of all Texans and of all Arkansans as well as the people of the United States. The heroes of Goliad and the Alamo must have understood, as fully as human mind could understand, the wonderful territory which they were rescuing in the name of liberty. They freely gave their lives for the happiness of future generations. While it is claimed that the designs of our Creator may be read in his handiwork, there is no man living who can approximate the wonderful future of the States of Arkansas and Texas; and when we refer to the names of Pike, Garland, English, and their peers, who have made the name of Arkansas famous, and the names of statesmen of the State of Texas, past and present, we feel that their greatness is in keeping with their country.

And having emulated the virtues of these statesmen and lawyers of the past generation, we have great courts, great judges, great lawyers; and a fair representation of them are with us on this occasion. We are especially fortunate in attracting the attention of the President of the United States to each commonwealth. He was lately entertained by the people of Arkansas at Little Rock, and a short time before that by Texas in the city of Dallas. He referred to the part of Texas he saw as the "Garden of the Lord"; and began to understand before he left these States that there were lights within their borders worthy to fill places of greatest responsibility. He expressed that idea in a substantial way by the appointment of Judge U. M. Rose to the Peace Conference at The Hague. This is an honor that belongs to our Southern country.

This meeting is also greatly honored by the acceptance of our invitation to read a paper by the Hon. David J. Brewer, one of the justices of the Supreme Court of the United States, the greatest organized court, to which the people of this nation look with confidence in the decisions of all great questions; no matter how high the tide of passion or political strife may rise, all parties and

politicians express the utmost confidence in that great court, in the decision of questions of national importance.

We thank you for your attendance, and our greatest hope now is that you may have a full enjoyment of the program; that you may feel perfectly free in our splendid city to do and talk as you please, no matter how irrelevant the talk may be, or how much you may vary from the record, and that when you leave Texarkana, you will not regret having come, and that you will also avail yourselves of the splendid opportunity of renewing the ancient friendship existing between these two great States.

[Hon. John C. Edwards, our county judge, began to prepare for this meeting over two years ago by planting trees, shrubbery and flowers in the courthouse yard. You can readily see that a public officer who would place "bouquets" around the courthouse is too esthetic to hold a public office; it will not do for the judge's time to be wasted in such foolish digressions, when that time is being paid for with the people's money. So a spirited fight was put up against him in the last primary for having committed this unpardonable sin of making the courthouse yard a beautiful park. But he won out in the contest, for a good many people approved the work, while others voted for him because the charge against him has not been proven beyond a reasonable doubt.]

Hon. Joe T. Robinson, of Lonoke, Ark., introduced by President Stayton, responded to the address of welcome on behalf of the Arkansas Bar Association as follows.

Messrs. President, Ladies and Gentlemen:

In accepting the keys of the city of Texarkana on behalf of the Arkansas Bar Association, I deliver them over to Messrs. Ashley Cockrill and Joseph M. Stayton, with absolute assurance that they will open everything in town permissible.

The Arkansas Bar Association has commissioned its most unfitted member to express a sentiment of good will and fellowship to the knights of the calf-bound volumes from the Lone Star State.

It is appropriate that the first joint meeting of the bar of Texas and Arkansas should assemble in this city. Texarkana, located

on the line between the two States here represented, named for both, has become the great gateway between these commonwealths. The spirit of activity which characterizes her industries and animates her citizenship is strikingly suggestive of the motives which prompt our meeting. There is enough of common glory and of contrast in the history of Texas and Arkansas to give especial charm to this occasion.

Arkansas emerged slowly from the bosom of the Louisiana Province, and her pioneers, thrilling with the spirit of adventure, conquered to the dominion of husbandry her rich domain. Texas sprang full-armed into the arena of nationality, bearing the banner of revolution baptized in the blood of her sons, and glorying in the achievement of her independence.

The Arkansas pioneer, boasting the best blood and courage of our race, with his long rifle and "coonskin cap," is in striking contrast with the Texas "cowboy," whose spurs and lasso, whose fleet-footed broncho and reckless daring redeemed from the wild the measureless plains of the West. Yet in courage and loyalty they were not dissimilar.

From the admission of Texas into the Union the historical currents of our States have flown in the same channel. Side by side the two States withdrew from the Union and sent forth their sons to battle beneath the Confederate flag. The undaunted courage of the soldiery of the one State is rivaled only by that of the other. In the light of days yet to dawn we shall review the scenes of conflict to which their heroism alike contributed. As one State, Texas and Arkansas took up the struggle of restoration following the close of the war between the States, and who will say that the achievements of both have not been wonderful! In recent years their industrial development has been truly marvelous. Nature has set no barrier between these States, and each has contributed to the best citizenship of the other. The days of the pioneer and the cowboy are passing. The white sheets of the emigrant wagons no longer move along the highways of my State to gleam on the horizon of Texas. That thrift and energy common to the inhabitants of both States have bound them with numerous railway lines and abandoned to the past slower means of communication.

Intimate and cordial relations have always existed between the citizens of Texas and Arkansas. From the hour when Texas became a State, there has been no time when her people have not found welcome in Arkansas, nor has there been a day when the Arkansan found himself a stranger in the homes of Texas.

The industrial, educational and political institutions of both States are much alike. Without interruption, through drought and flood, through war and peace, through calamity and good fortune, we have all with equal fidelity worshipped God occasionally and voted the Democratic ticket always.

Congressman Lacy of Iowa recently said: "A traveler can pass from the Missouri line on the north to the Louisiana line on the south, or from Memphis, on the east, to Texarkana, on the west, through Arkansas and find hospitality in the homes of Arkansas without expense." He might in truth, have added that, should the traveler continue his journey westward, he would meet with the same happy experience all the way until his eyes rested on the gray sands that glitter on the banks of the Rio Grande. In this spirit of comradeship and hospitality we have assembled in Texarkana. It is far enough from home for many of us who are benedicts to enjoy a sense of freedom from the petty tyranny which restrains us there; while to our bachelor brethren it offers new opportunities of pleading in "Cupid's court" on a change of venue that great lawsuit all men should litigate, which many lose, and others, having won, wish they had lost.

While the citizens of both States are characterized by generosity, energy and hospitality, we also boast with pride many illustrious names. The glory of leaders, brave in battle and unconquerable in death; the renown of statesmen, patriotic in counsel and eloquent in debate.

The history of our profession is adorned by the services of many eminent lawyers in Texas and in Arkansas. It would be fatiguing to call the roll of all the great lawyers whose names distinguish the profession in either State, but I can not refrain from mentioning some whose careers have added glory to our common progress and tempered with mercy the power of justice.

John Hemphill, First Chief Justice of Texas, never knew conjugal bliss, but through all his years of bachelorhood he guarded with sacred faith the marital relations. The Supreme Court of his State, in one of its decisions, has erected to the memory of this man a monument that will stand unimpaired when marble shafts have crumbled into dust. By his decisions, it is adjudged that he was the champion of the homestead rights in his great State.

Abner Smith Lipscomb associated his name with the adoption of the Constitution of '46 and with the development of Texas jurisprudence. Of him the biographer has said: "The career of Judge Lipscomb would have adorned the ermine of any country in any age."

Royall T. Wheeler stamped indelibly the impress of his lofty character on the decisions of the highest court of Texas. His achievements were not the fruits of genius, but rather the results of tireless and unceasing labor. In the wanderings of his melancholy mind he found an unfortunate, untimely end, but his name shall not be forgotten.

Robert M. Williamson, "Three-Legged Willie," brilliant, versatile, tolerant, indulgent, considerate of the younger members of his profession, did more, it is said, in precipitating and sustaining the Revolution of 1835 than any other man. In striking contrast was his life to that of Wheeler. His works were the outcome of genius. He did not study books, for in his mind was contained "the stuff of which books are made."

Oran Roberts, plowboy, student, lawyer, jurist, soldier, statesman! He knew Texas better and loved her as well as any son she ever honored. The idol of his people, he stood for the geographical integrity of the Empire of the Southwest, and resisted with all his great powers the division of Texas into several States. From the bench and in the forum he spoke for education: "The common schools for the millions, the academies for the thousands, and the college or university for the hundreds."

Richard Coke, faithful in every issue, great as a lawyer, impartial as a judge, eminent as a statesman, loyal as a citizen! He

redeemed his State from martial law and restored civil authority, declaring: "While standing unyielding by the principles of government we believe to be correct and maintaining inviolate the faith within us, we should put our feet upon every narrow and sectional feeling, and embrace in our efforts and aspirations the glory and advancement of the whole country."

John W. Stayton exemplified in his life the highest judicial type. To him a biographer has applied the attributes ascribed by Sir James Mackintosh to Grattan: "The purity of his life is the brightness of his glory."

John H. Reagan, whose long and varied public career belongs to the nation as well as to Texas, secured the undivided confidence of his countrymen by firmness of character, fixedness of purpose and soundness of judgment.

Your patience would fail me should I now attempt to mention the many eminent lawyers still living who honor their profession in Texas. The list would include, among many others, such names as those of George Clarke, Wharton Terry, W. F. Crawford, F. E. Sneed, Henry Coke, Charles A. Culberson and Joseph W. Bailey.

The profession of law in Arkansas is likewise glorified by many illustrious names.

The Conways moved conspicuously among the stirring events which illuminate the pages of early Arkansas history. Their services, however, relate more intimately to military and political affairs than to the subject of jurisprudence.

Robert Crittendon's marvelous personality towers through the mists that envelop the Territorial period of my State. Handsome, eloquent, courageous, spectacular! The luster of his genius grows brighter with the passing years.

William M. Cummins and Ebenezer Cummins attained to national fame as lawyers. Both, at different times, were in partnership with Pike, and Ebenezer Cummins late in life was associated with Garland. The first four volumes of Arkansas Reports attest the remarkable power of William Cummins in legal arguments. He was politically ambitious, and performed efficient serv-

ice in the Constitutional Convention of 1836. Ebenezer Cummins knew no master save the law.

Archibald Yell, District Judge of Arkansas Territory, First Member of Congress from his State, after serving also as Governor, went to rest beneath a monument among the mountains of Northwest Arkansas, and the inscription on his tomb appropriately describes his career: "A gallant soldier, an upright judge, a fearless champion of popular rights, a sincere friend, an honest man."

Chester A. Ashley associated himself with the Little Rock bar contemporaneously with Crittendon, and throughout his life as lawyer and as statesman he maintained the highest ideals of personal and professional conduct.

The pioneer days of Arkansas gave prominence to many other brilliant lawyers. Among them may be numbered Daniel Ringo, eminent First Chief Justice of the State; Ambrose H. Sevier, Benjamin Johnson, our first Federal Judge; William S. Fulton (the intimate friend of President Jackson), who abandoned his professional career for politics; John Pope, Ben Desha and Elias Rector, all of whom were men of power and lawyers of marked ability, some of them receiving national recognition at the bar.

Jesse Turner, the soul of honor, witty, resourceful, powerful, would have done honor to any bar and ably represented any cause.

Grandison Royston presided over the Constitutional Convention of 1874 which adopted our present Constitution, then and for many years thereafter a very satisfactory production, but now become, in some respects, antiquated.

Sterling R. Cockrell, for many years among our foremost lawyers, gave to the State a brief, but exceedingly brilliant and able service as Chief Justice of the Supreme Court, voluntarily retiring to resume his practice, and dying in the very prime of his life.

The bar of the State at present is characterized by great ability. It includes John M. Moore, familiarly known as the "Red Fox," whose cunning never excelled his ability and does not equal his assiduity; Jacob Trieber, now a Federal judge, whose research, energy and natural talents, combined with a genial disposition,

have so far relieved him from the antipathy sometimes felt in Arkansas towards occupants of the Federal bench; Judge John H. Rogers, James P. Clarke, who practices law for a living and follows politics for the good of his country; J. H. Harrod, successful as a counselor and as an advocate, but unfortunate as a politician; Hon. Joseph M. Stayton, President of the Arkansas State Bar Association, and many other gentlemen, some of whom are with us.

Three Arkansas lawyers of great ability conclude my list. Two of them belong to the past. The other still gives to his clients, his State, his nation and the world the best and noblest efforts of his cultured mind.

Albert Pike was for many years the idol of my State. The pathos of his poetry and his learning as a Mason equal but do not exceed his ability as a lawyer. No man of all our country's past, it seems to me, possessed a more refined nature, a sweeter, holier mind. On a public square in the city of Washington stands a monument to his fame. Every day the hurrying feet of thousands of his fellow countrymen pass and repass the spot where stands his statue, and, looking upon the stately dignity of his figure, recalling the majesty of his character, youth receives an inspiration, while age indulges in admiration and reflection.

Augustus H. Garland is universally recognized as among the foremost lawyers of the Republic's past. The affectionate and long-continued friendship with his stepfather, his early partner and companion, his brilliant, if sometimes inconsistent, political career, his eminent service as Attorney General of the United States, his retirement from political life to renew his professional activity, his tragic death while pleading a client's cause before the Supreme Court of the United States, are circumstances familiar to you all. A member of the Confederate Congress, he refused to take the test oath prescribed by act of Congress when the war was ended, and demanded the right to practice in all the courts of his country without subscribing to an obligation which would convict him of perjury. *Ex Parte Garland*, reported in 4 Wallace, determined the unconstitutionality of the statute, and opened

again to the lawyers of the South the profession, from which, by reason of the oath prescribed, they had been excluded.

If, by mentioning in laudatory terms gentlemen who are present, I subject myself to criticism for immodesty, I console myself with the consideration that genius has too often gone unrewarded to its grave and merit been unrecognized in life. Commendation can neither shame nor flatter the great. It is, indeed, and has ever been, their chief reward. Of the three great lawyers of Arkansas I have mentioned two, Pike and Garland. The third is U. M. Rose. I shall not indulge in useless ecomiums upon his character or ability. Neither have ever been questioned. He is one of the few men this world has produced so upright in his conscience that none have dared assail him. Only one sun has shone in his sky. He has never followed that will-o'-the-wisp called political ambition. His life has been given with sacred devotion to the pursuit of his profession. By him no client's cause was ever sacrificed or neglected. Free from the passions that so often mar the lives of eminent lawyers, he has never known indulgence or excess. Incapable alike of injustice and dishonesty, he has come to that richest of all inheritances, an old age adorned by virtue and glorified by power. As the crowning service of his life he goes to The Hague as a representative of this great government in the international conference of peace. What a court he is called to attend! The causes litigated there affect the destiny of the world in future ages. In that court the nations of the earth will appear as clients, and peace and war as contending counsels. Called to try the age-long, world-wide issue between harmony and strife, to determine the question whether force or justice shall prevail. What shall the judgment be?

A few years ago a great American lawyer ridiculing the hope of international peace said: "You may talk of orderly tribunals and learned referees. You may sing in your schools the gentle praises of the quiet life; you may strike from your books the last note of every martial anthem, yet out in the smoke and the thunder will always be the tramp of horses and the silent, rigid, upturned face. Men may prophesy and women pray, but peace will come

here to abide forever on this earth only when the dreams of childhood have become the accepted charts to guide the destinies of men. Events are numberless and mighty, and no man can tell which wire runs round the world. The nation basking in contentment and repose today may still be on the deadly circuit and tomorrow writhing in the toils of war."

It is the truth or falsity of this charge that must be tried at The Hague. "Grim-visaged War" will speak in bugle blasts and rolling drums. That milder counselor, called Peace, will smile and hope and bless. The one will point to charging hosts, to bloody fields and hearts heavy with despair. Peace will exhibit gardens and meadows and fields of grain. War will flash his saber and march with measured step toward monuments above the dead. Peace will lead through ways of plenty to contented homes. Whose counsel will prevail? Need I tell you on which side I think Judge Rose will be? No greater task was ever imposed, no weightier responsibility can come to man. Will not Texas join with Arkansas in bidding him success?

"The world needs and must have, and forever will have, at the front men who live in the future. Men whose eyes are in their faces; who look forward and press onward, and do it eagerly. From such men the world elects its leaders. It is always so, it always will be so."

If I may be pardoned for the fault of moralizing (common to the inexperience of youth), the lawyers in America are, in some sense, the trustees of the political as well as the commercial fortunes of the public. Lawyers, by their peculiar training, become the leaders of the people. When the strong arm of the public has established liberty, the lawyer is called to write its principles in constitutions and statutes. He alone can maintain those principles in the courts. This responsibility is indeed great. Whether the profession fully measures up to the standard that these responsibilities require, I shall not presume to say. We all agree no standard can be too exalted. Honesty and loyalty must be equally emphasized with intelligence. In a large degree, the bar fix and maintain, or pervert, the standard of the judiciary. The necessity

for purity of mind and incorruptibility of purpose is apparent from the nature of judicial duties. Justice is the aim of all laws, and the object of our profession is to establish and maintain it. Ideal conditions can not, of course, exist. Crime will continue to work its ruin in the shadow of prison and courthouse; fraud has always crept along the pathway of human progress. Contention and dispute may never be banished from the lives of men. Yet, if the great power of our profession shall be exerted through all its organizations to promote the ends and aims of universal justice, its influence will be immeasurable.

With Schiller I conclude:

"It is the most important concern of every state and throne
That Justice should prevail,
And all men in the world should have their own;
For there where Justice rules everyone enjoys his property
secure,
And over every house and every throne Law watches with an
Angel's eye."

Hon. Edward F. Harris, of Galveston, introduced to the audience by President Garwood, responded to the address of welcome on behalf of the Texas Bar Association as follows:

Messrs. President, Ladies and Gentlemen:

In behalf of the Texas Bar Association, I thank the bar of Texarkana for the welcome so generously and so sincerely tendered through my brother Arnold.

It is pleasant to us to be in the house of friendship; it is grateful to feel that we are surrounded by the atmosphere of cordial hospitality. When to this is added the felicity of meeting in joint session for the first time in history with our brothers of the Arkansas bar, our cup of joy runneth over; we are of good heart and exceeding happy.

This is the season of our annual foregathering. Four and twenty years have marched with even tread into the ever receding past since the birth of the Texas Bar Association. Great men have shared its fortunes; wise men have participated in its de-

bates; learned men have spoken words of calm instruction; good men have labored for its welfare; congenial men have graced its banquet board.

We have had our ups and downs, our periods of advancement and our periods of retrogression; but the general movement has been forward and upward, and the sharers thereof may rejoice and be of good cheer. Indeed, when I realize from what small beginnings and modest pretensions there have sprung worthy achievement and State influence, I can not but extend to all the members of our Association the warmest congratulations.

And as we pause for a moment and, looking backward, recall from memory's spacious chambers visions of all the faces we have loved—brothers guided by lofty motives, fired by honorable ambitions, proud alike of a common profession and a common country—and thus recalling, each of us feels how scattered and dispersed they are, some sore stricken with the wounds of the world, some gone to the other shore, some, alas, drifting with the tide, he can not but feel that he would, if he could, renew the loving strength of olden ties and call from the days so distant and so dear the missing spirits of departed youth.

The dominant idea of the Texas Bar Association must be sympathy—that fellow-feeling which makes us wondrous kind; that unselfish mental attitude which makes of us gentle censors and just critics; that child, also, of the heart which complements clear, practical vision with kindly instincts and charitable impulses. Sympathy is an organic necessity of life. As the rose blossoms in all its pure beauty under the sympathetic kisses of the Sun-god and the sympathetic tears of the Dew-god, so the human soul breathes forth its sweetest flowers of sentiment and thought only when watered with human sympathy and shone upon by human love.

Here in the Gate City of Texas and Arkansas, within easy touch of old Louisiana and new Oklahoma, we of Texas with you of Arkansas meet as co-sharers of a bright today, as joint heirs-expectant of a brighter tomorrow, recipients of the hospitality of our local brethren, and we accept the proffered hand of welcome and thank

you, my brothers of Texarkana, brave men and gentle, for the loving tender of your generous and bountiful hearts.

Mr. Joseph M. Stayton, being presented to the audience by President Garwood, delivered the President's annual address of the Bar Association of Arkansas.

[For the address of President Stayton, see Appendix.]

President H. M. Garwood, of the Texas Association, introduced by President Stayton, delivered the President's annual address of the Texas Bar Association.

[For the address of President Garwood, see Appendix.]

On motion, the joint session of the Associations adjourned till 2 o'clock p. m.

FIRST DAY.—AFTERNOON SESSION.

President Jos. M. Stayton, of the Arkansas Association, called the Associations to order at 2 o'clock p. m.

The President, Jos M. Stayton, then introduced Judge U. M. Rose, of Little Rock, who read his paper on "The Code of Napoleon."

[For the paper then read by Judge Rose, see Appendix.]

President Garwood, of the Texas Bar Association, then introduced Hon. R. G. Street, of Galveston, who read a paper on "The Evolution of the Law by Judicial Decision."

[For the paper then read by Judge Street, see Appendix.]

President Stayton introduced J. F. Sellers, of Morrilton, Ark., who read a paper on "Trade Monopolies and Their Legal Restraint."

[For the paper then read by Mr. Sellers, see Appendix.]

PRESIDENT STAYTON: I am requested to announce that a reception will be given tomorrow night, between Second and Broad

streets, on Vine Street, at the Elks Hall. All the lawyers, lawyers' wives, lawyers' sweethearts, and the ladies and gentlemen of Texarkana are requested to attend.

There is to be a banquet Thursday night—which, I believe, is news to us all—and I am also requested to announce that if any lawyer or wife of a lawyer leaves town, or tries to leave town before then, they will be arrested.

There is to be a lecture by the Hon. Philip Lindsley, of Dallas, Texas, at the courthouse tonight, subject: "Growing Up With the Country."

Under the rules of the Association, if any gentleman desires to be heard, the Presidents of the joint Associations will be very glad to hear them; but suggest that, in view of the lateness of the hour, and the many subjects presented today, it will be better to hear them tomorrow.

I am speaking for Mr. Garwood and myself, and will say it is getting very dry at this end of the house.

MR. GARWOOD: A motion to adjourn will be considered.

On motion, the joint session adjourned till 10 o'clock a. m. on the following day.

SECOND DAY.—MORNING SESSION.

The joint session was called to order by the Presidents at 10 o'clock a. m.

President Garwood introduced Judge Selden P. Spencer, of St. Louis, Mo., who addressed the Associations upon the topic, "Lawlessness and Lawyers."

[For the address of Judge Spencer, see Appendix.]

President Stayton introduced to the audience Mr. Lewis Rhoton, of Little Rock, Ark., who read to the Associations a paper on "The Law of Bribery."

[For the paper then read by Mr. Rhoton, see Appendix.]

President Garwood introduced Hon. Thomas W. Gregory, of Austin, Texas, who read a paper entitled "The Origin and History of the Ku Klux Klan."

[For the paper then read by Mr. Gregory, see Appendix.]

The afternoon of the second day being set apart to separate meetings of the two Associations for the transaction of their business, and the evening to the reception tendered them by the citizens of Texarkana at Elks Hall, the joint session then adjourned till 10 o'clock on the morning of July 12th.

[Tuesday evening, 8 o'clock, Hon. Philip Lindsley, of Dallas, lectured at the courthouse on "Growing Up With The Country." The lecture was greatly enjoyed by the large audience present. There was no stenographer present, and we are unable to print the address.]

THIRD DAY.—MORNING SESSION.

The joint session was called to order at 10 o'clock a. m. by the Presidents.

President Stayton, of Arkansas, introduced to the Associations and the audience Justice David J. Brewer, of the Supreme Court, who delivered the annual address, the subject being, "Two Periods in the History of the Supreme Court."

[For the address of Justice Brewer, see Appendix.]

President Garwood, of Texas, introduced Mr. Saml. B. Dabney, of Houston, Texas, who read to the Associations a paper on the subject, "A Criticism of the Organization of Our Courts and a Theory for Their Reorganization."

[For the paper then read by Mr. Dabney, see Appendix.]

President Stayton introduced Mr. William B. Smith, of Little Rock, who read a paper entitled "Bills of Lading as Collateral Security for Loans."

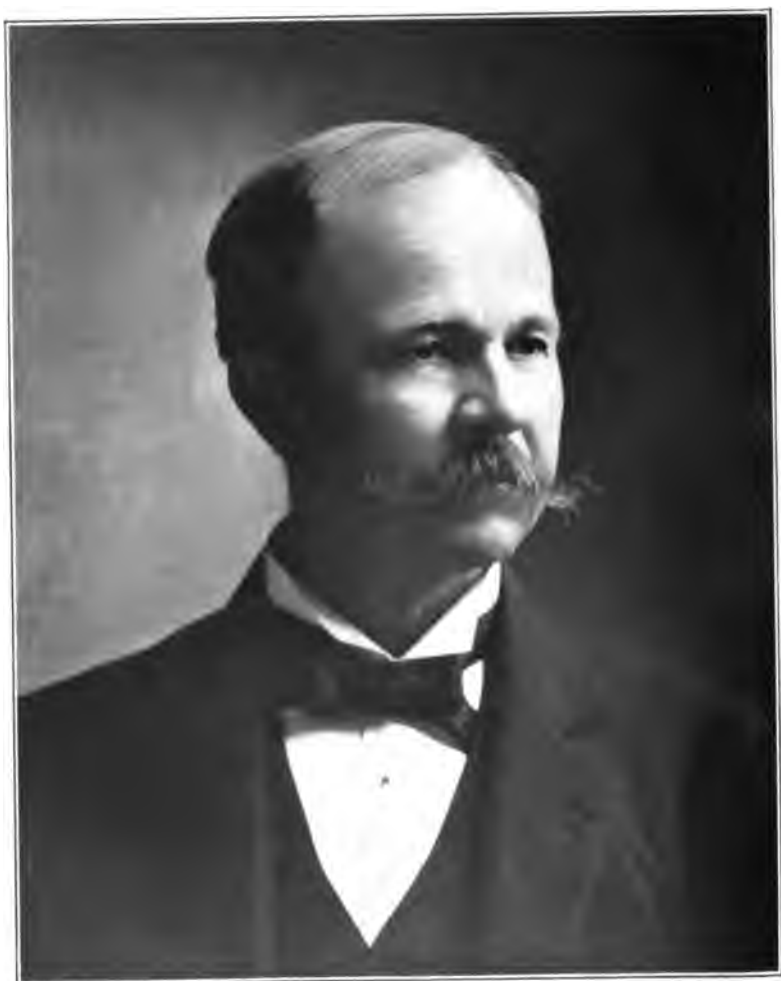
[For the paper then read by Mr. Smith, see Appendix.]

After returning thanks to the guests of the occasion, Judge Spencer and Justice Brewer, in a motion which declared them elected to honorary membership in the joint Associations, and announcement of the separate sessions of the respective Associations for the afternoon, and the joint banquet tendered them at the courthouse of Miller county that night by the bar and citizens of Texarkana, the joint session of the Associations was declared finally adjourned.

PROCEEDINGS
OF THE
NINTH ANNUAL SESSION
OF THE
BAR ASSOCIATION OF ARKANSAS
HELD AT
TEXARKANA, ARKANSAS,
JULY 11 AND 12, 1906.

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JOSEPH W. HOUSE,
PRESIDENT BAR ASSOCIATION OF ARKANSAS, 1906-07.

DECLASS

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BASIC CRITERIA:

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Th. J. J.

Figure 4 shows the results of the regression analysis. The results indicate that the model explains 60% of the variance in the dependent variable. The regression equation is:

The *Journal of the American Medical Association* has been a leading force in the fight against the use of opiates. It has been the first to publish the results of the Commission on Narcotics, and it has been the first to publish the results of the Commission on the Causes and Prevention of the Opioid Epidemic. It has been the first to publish the results of the Commission on the Causes and Prevention of the Opioid Epidemic. It has been the first to publish the results of the Commission on the Causes and Prevention of the Opioid Epidemic.

1. *W. J. G. & J. A. G. (1997) A new species of the genus *Proctos* from the family *Proctos*. *Journal of the Royal Microscopical Society*, 117, 1-10.*

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HOUSE.
1890-1891.

PROCEEDINGS
OF THE
NINTH ANNUAL SESSION
OF THE
BAR ASSOCIATION OF ARKANSAS,
HELD AT
Texarkana, Arkansas, July 11 and 12, 1906.

SECOND DAY.—AFTERNOON SESSION.

The Association was called to order by President Stayton, July 11th, at 2 p. m., in the Miller County Courthouse, who announced that the Association was open for business.

The Secretary read a list of names of those who had made application for membership, and stated that the Executive Committee had passed on each favorably.

They were as follows: E. G. Schoonover, Pocahontas; A. J. Witt, Pocahontas; J. H. Jackson, DeQueen; R. C. Powers, Little Rock; Frank Smith, Marion; N. B. Williams, Fayetteville; Frank H. Dodge, Little Rock; John H. Holland, Greenwood; W. D. Brouse, Sheridan; W. J. Lamb, Osceola; J. A. Gillette, Atkins; David B. Sain, Nashville; J. G. Sain, Nashville; Jas. H. Stevenson, Little Rock; C. W. McKay, Magnolia; G. G. Pope, Texarkana; M. S. Cobb, Hot Springs; H. B. McKenzie, Prescott; John Bruce Cox, Little Rock; Fred W. McDonald, Little Rock; R. G. Harper, El Dorado; T. B. Morton, Fordyce; John B. McCaleb, Batesville; D. W. McMillan, Hope; J. H. McMillan, Arkadelphia.

Upon motion, all were duly elected.

It was suggested that several members of various committees were not present, whereupon the President appointed W. S. Good-

win, Ashley Cockrill, and C. T. Coleman to fill vacancies in the Nominating Committee.

The Secretary read his report, as follows:

To the President and Members of the Bar Association of Arkansas:

Immediately after the adjournment of the last meeting of the Association, at the suggestion of Texarkana lawyers, I got into communication with Mr. Wilkinson, Secretary of the Texas Bar Association, and our correspondence lead to an invitation from this city to the Texas Bar Association to meet here. Several Texarkana members of each Association attended the meeting of the Texas Association for the purpose of presenting the invitation. The result is this joint meeting.

President Stayton, W. H. Arnold, Vice-President, and Messrs. Cockrill and Dooley, of the Executive Committee of our Association, went to Dallas some time later to attend a meeting of the Executive Committee of our Association and the Board of Directors of the Texas Association to arrange the program and details of the joint meeting. There has been a great deal of hard work done in endeavoring to make the meeting successful both in numbers and interest. The local Texarkana Entertainment Committee, which was appointed at Dallas, consisting of Messrs. W. H. Arnold, J. D. Conway and W. L. Estes, which was increased by the addition of every lawyer in the two cities, has performed its duty well, and before you leave here I am sure you will agree with me. Your Secretary, together with Mr. Saner of the Texas Association, attended one meeting of the local committee here for the purpose of making final arrangements for the meeting.

I prepared and superintended the printing of the minutes of the last meeting. We were very unfortunate, and, at the same time, fortunate. The minutes had been put in type and the proof was ready for delivery, when the plant of the Arkansas Democrat Company was burned and the type destroyed. Several days after the fire, however, the roll of original copy was found in a badly damaged condition, but most of it was legible.

All members were sent a copy of the program several weeks before the meeting, and a letter and program were sent to over 250 lawyers in the State who do not belong to the Association. We have had twenty-five applications for membership.

There has been no correspondence of general interest to the Association (except the letters declining and refusing to take part on the program when requested to do so).

After considerable correspondence, we succeeded in securing from the railroads a rate of one fare plus 50 cents for the round trip from points in this State, and also free transportation for two of the guests of the Associations.

Judge Henry C. Caldwell, owing to his absence from the State, has resigned from the Association. I would suggest that he be made an honorary member of the Association.

In compliance with a resolution adopted at the last meeting I wrote two letters to each member who was delinquent in the matter of dues, to the effect that unless he paid the same within thirty days his name would be dropped from the roll. In point of fact, on account of the fire, it was several months before the books were closed. Quite a number neglected to respond, and their names do not appear in the list of members in the minutes of last year.

Since the filing of report last year I have collected dues as follows: At last meeting, \$161; delinquent dues collected after meeting, \$146, and \$300 of this year's dues, making a total of \$607, which has been turned over to the Treasurer.

This report is respectfully submitted with the request that the same, together with the Secretary's books, be submitted to the Auditing Committee.

ROSCOE R. LYNN,
Secretary.

The report was received and filed.

Upon motion, Judge Henry C. Caldwell was, by a unanimous rising vote, elected an honorary member of the Association.

The Treasurer read his report, as follows:

To the President and Members of the Bar Association of Arkansas:

Your Treasurer begs leave to submit herewith his report of receipts and expenditures during the current year, with vouchers attached, and asks that the same be examined by the Auditing Committee and settled.

STATEMENT OF ACCOUNT.

Debits.

June, 1905.	To Balance as shown by report at last meeting.....	\$ 555 60
	Dues collected by Secretary at last meeting.....	161 00
	Delinquent dues collected after meeting.....	146 00
July, 1906.	To current year dues from Secretary.....	300 00
	Total	\$1,162 60

Credits.

June, 1905.	By Arlington Hotel bill for banquet, etc.....	\$ 464 00
	Arkansas Democrat Co., printing menus and stationery, etc.	48 00
	Commissions to Secretary, by order of Executive Committee ..	100 00

Dec. 1905.	Arkansas Democrat Co., printing minutes.....	98 00
June, 1905.	Expenses, trip to Hot Springs to arrange for banquet, etc.	19 00
	Exchange on checks.....	35
	Henry D. Ashley, expenses.....	40 00
	Postage	28 00
June, 1906.	Expenses of Secretary to Texarkana to aid in making arrangements for meeting.....	11 00
July, 1906.	Arkansas Democrat Co., stationery and circular letters, etc.	22 95
	Postage	19 00
	M. C. Lilley Co., part payment on badges.....	15 00
	Expenses of Messrs. Stayton, Dooley and Cockrill to Dallas, Texas, to meet committee of Texas Association to arrange for joint meeting, \$25 each	75 00
	Total	\$ 940 30
	Balance on hand.....	\$ 222 30

Respectfully submitted,

P. C. DOOLEY,
Treasurer.

The President appointed D. D. Terry, J. Merrick Moore and W. C. Adamson a special auditing committee to examine the Secretary's and Treasurer's reports and books, with instructions to report the next afternoon.

The President requested any committee that was ready to report, to do so at this time.

W. S. McCain, Chairman of the Committee on Memorials, made the following oral report:

"I have a report here which I will ask the Secretary to read in regard to the death of Mr. Morrison.

"We have also lost another member, Ex-Governor Hughes. I had intended to prepare a memorial on the death of Governor Hughes. To write a story of Governor Hughes' life would be merely to write a history of Arkansas for the last forty years. He was one of the most noble characters with whom we have ever associated. A man with marked ability; he was one of those men that are great models to the younger generations of the State, and

it would have been well if we had had a tribute to pay to his memory at length by some one competent to do so, but it is hardly necessary for us to begin, at length, the story of the life of a man whose character and life and labors are so familiar to every one of us. I have been named on a committee, with Judge Rose as Chairman, to prepare a memorial which will be submitted to the Supreme Court and will be published, and perhaps, for that reason, it is not necessary to have a written memorial here. If there are any other of the members who have died since the last meeting of the Association, I am not able to recall it."

Upon motion, it was resolved that when the memorial to Judge Hughes was prepared, that it be published in the minutes of the Association.

The Secretary then read the memorial, as follows:

MEMORIAL SKETCH OF H. R. MORRISON.

H. R. Morrison was born November 1, 1875, in Claiborne county, Mississippi. He came to Hot Springs in 1884. He served for some time as one of the messenger boys for the *Daily News*, and filled other positions in the city of Hot Springs, until he accumulated, by his own efforts, sufficient funds with which to defray his expenses at Washington-Lee University, which institution he entered in 1895. After completing his collegiate course at that institution, he returned to Hot Springs, and entered the law office of G. G. Latta, Esq., with whom he remained for about three and a half years. He then opened an office of his own, and also became manager of the Garland Abstract Co., and also established the well-known firm of Morrison & Belding, in insurance and real estate. By diligence and close application to his business, he made rapid progress in a business way, and was very successful in the different branches of business that he conducted. He was elected City Attorney two terms and then declined re-election. He became a candidate for Prosecuting Attorney of the Seventh Judicial District, and was elected as such, and was filling that office at the time of his death. He devoted himself to the duties of the office, and made close study of all branches of the criminal practice, and became a very efficient officer. He intermarried with the daughter of the Hon. Clifton R. Breckenridge. He departed this life on January 25, 1906, after a most acute and severe attack of appendicitis.

His death was indeed untimely, and it was sad that one so young and so full of hope should have thus been carried away. He was a good lawyer, a good citizen, an able prosecuting attorney, and a devoted husband. In

his death, the Bar Association has sustained a loss that every one must deeply regret.

Submitted by

G. G. LATTA,
Of Committee on Memorials.

The President called for report of the Special Committee on "Codification of the Law." J. E. Williams, the Chairman, stated that the committee had not prepared the report contemplated under the appointment, and, as only three of the committee were present, asked for further time. The President stated that, if there were no objections, further time would be given.

The President called for report of Special Committee on "Chancery Districts." Jos. M. Hill, the Chairman, read a list of the members of the committee, and requested them to meet him immediately upon adjournment of the meeting. The Chairman later asked that the committee be given further time, which was granted, with directions to report at the next meeting.

Judge U. M. Rose, Chairman of Law and Law Reform Committee, said: "We do not think it necessary to encumber the Bar proceedings by a written report. We can not see that anything can now be done in that direction of a very important nature. The Legislature of this State has had before it the Negotiable Bill Act, which has been passed and adopted in some twenty-four States. It seems, however, that during the time our Legislature is in session, with the business before it, that all its time is occupied, and not the slightest interest is taken in the bill. I imagine that if we entered into any legislative reform of any considerable consequence, that the result would be the same. I take it, that at present the outlook is not very hopeful, and perhaps it is better to state this matter to the Association now, and let it lay over for future action if this meets with the approval of the Association."

The President stated that, hearing no objection, the matter would be passed, as suggested by Judge Rose.

The President then called for report of the Committee on Judicial Administration. Judge Jacob Trieber, the Chairman, was not

present, but had prepared a report, which was read by the Secretary, as follows:

To the President of the Bar Association of Arkansas:

The Committee on Judicial Administration would respectfully submit the following recommendations:

First. In order to expedite the work of the Supreme Court, each of the justices should be furnished, at the expense of the State, with a stenographic clerk. The last General Assembly passed such an act, but it was vetoed by the Governor, and for this reason failed to become a law. It is hardly necessary to say anything to lawyers engaged in active practice of the necessity of such a measure, and in view of the fact that our Supreme Court is still over a year behind in its work, in spite of the large number of opinions delivered weekly, this Association can not be too emphatic in its recommendation for the passage of such an Act by the next General Assembly.

Second. Under the existing laws of the State, a motion for a new trial or rehearing must be granted at the term at which the cause was determined, otherwise the court is without jurisdiction to grant it. In view of the fact that under our practice a motion for a new trial serves as the assignment of errors, without which the Supreme Court can not examine into any alleged errors in actions at law, such a motion must necessarily be made by the party desiring to take an appeal. In the large majority of the counties of the State the terms of the circuit courts are so short that in many instances such motions are disposed of without argument or consideration, and can only be hurriedly prepared. We, therefore, recommend that the General Assembly enact a law permitting judges of the circuit courts, as well as the judges of the Supreme Court, to act on motions for new trials or rehearings, if filed at the term at which the judgment was entered, either in vacation or the term next succeeding.

Third. The ethics of the profession require that none but men of the strictest integrity should be permitted to engage in the practice of law. Our present statutes for the disbarment of unworthy lawyers are so defective that it is almost impossible to prosecute proceedings for disbarment successfully. In our opinion, the law should authorize any attorney, or any committee appointed by any bar association, either the State or local association, to institute such proceedings, and thus prevent unworthy persons from continuing the practice of the profession.

Respectfully submitted,

JACOB TRIEBER,

Chairman.

Upon motion, the first paragraph was adopted. After con-

siderable discussion, the second paragraph was rejected. Several suggestions were made in reference to the third paragraph, and it was finally concluded that it is the duty of the prosecuting attorney to institute such proceedings, and no action was taken on that paragraph.

Upon motion, the meeting adjourned until Thursday, 2 p. m.

THIRD DAY.—AFTERNOON SESSION.

The Association was called to order by the President, in the Texarkana, Texas, city hall.

The Secretary read the applications for membership received since yesterday's session, and they were all elected, as follows: John Field Simms, Texarkana; Henry Moore, Jr., Texarkana; J. D. Chastain, Fort Smith; G. A. Hays, Texarkana; B. A. Lewis, Texarkana; A. M. Garrison, Texarkana; J. W. Bishop, Nashville; J. O. A. Bush, Prescott; R. M. Mann, Texarkana; J. Merrick Moore, Little Rock; D. D. Terry, Little Rock; Otis T. Wingo, DeQueen; W. P. Feazel, Nashville; Clarence H. Henderson, Pocahontas; J. I. Alley, Mena; E. F. Friedell, Texarkana, and Sam R. Chew, Van Buren.

The Auditing Committee, by Mr. Adamson, reported as follows: "We beg leave to state that we have examined the reports and books of the Secretary and Treasurer, and find them correct. There is on hand the sum of \$222.50; which does not include the dues collected at this meeting, which, the Secretary informs us, is about \$150."

The Committee on Judiciary stated it had no report to make.

W. B. Smith, Chairman of the Committee on Appeals and Grievances, made the following oral report:

"Mr. Chairman, I hardly know what the duty of this committee is. The language used would indicate that grievances against any member of this Association should be passed upon by the committee. We have had a meeting of our committee and there have been

no grievances submitted to it, and, as the Association knows, there have been no appeals. But since morning a member of the Executive Committee has come to me and submitted a grievance that I think is warranted, and I feel that I should call the attention of the Association to it. It has been said by this member that there is a lack of interest on the part of the members of this Association, to such an extent that it has been with difficulty that his committee could secure the consent of members of the Association to read papers, and to respond to toasts, and that it was a matter of humiliation to the Executive Committee. This is a matter that I would have written a report upon if it had been spoken of earlier. It strikes me as a vital matter, and I hope this will go in the minutes so that the members of the Association may appreciate it. If we expect to maintain an Association, the members must be willing to do their duty, and to respond, when called upon. We feel that when members are called upon they should be willing to sacrifice some of their private interests and arrange matters so they can attend some of these meetings, and contribute something to make the meetings a success. There has been no progress in any science or profession greater than that in medicine and surgery; this is due in a large measure to the fact that the doctors and surgeons of the State give more attention to their local and State organizations, and attend their meetings more generally. I believe we ought to stimulate an interest in our meetings. We not only get benefit from a social standpoint, but interesting questions are brought up, and I feel that it is not amiss for the Grievance Committee to report that there is a ground for grievance on account of lack of interest."

The Committee on Professional Ethics had no report to make.

R. R. Lynn, Chairman of the Committee on Publication, made the following oral report: "The committee published the minutes of the last meeting; you have each received a copy of the same. This is a sufficient report of our work, as it speaks for itself."

Allen Hughes, Chairman of the Nominating Committee, made the following report:

To the President and Members of the Bar Association of Arkansas:

Your committee respectfully nominates the following named gentlemen for the officers of this Association for the ensuing year: President, Jos. W. House, Little Rock; Vice-President, Wm. H. Arnold, Texarkana; Secretary, Roscoe R. Lynn, Little Rock; Treasurer, P. C. Dooley, Little Rock.

Vice-President for each Judicial Circuit: First, John Gatling, Forrest City; Second, J. T. Coston, Osceola; Third, John B. McCaleb, Batesville; Fourth, N. B. Williams, Fayetteville; Fifth, R. B. Wilson, Russellville; Sixth, W. S. McCain, Little Rock; Seventh, W. H. Martin, Hot Springs; Eighth, T. C. McRae, Prescott; Ninth, W. C. Rodgers, Nashville; Tenth, W. S. Goodwin, Warren; Eleventh, W. F. Coleman, Pine Bluff; Twelfth, J. B. McDonough, Fort Smith; Thirteenth, J. W. Warren, Lewisville; Fourteenth, G. J. Crump, Harrison; Fifteenth, Sam R. Chew, Van Buren; Sixteenth, E. G. Schoonover, Pocahontas; Seventeenth, T. C. Trimble, Lonoke.

Executive Committee: Ashley Cockrill, Chairman, Little Rock; E. A. McCulloch, Little Rock; Chas. T. Coleman, Little Rock, P. C. Dooley, Little Rock; W. H. Arnold, Texarkana; Joseph M. Stayton, Newport; Roscoe R. Lynn, Little Rock.

Respectfully submitted,

ALLEN HUGHES,
Chairman.

Upon motion, the report of the committee was adopted, and the gentlemen nominated were elected officers of the Association for the ensuing year.

Upon motion, the Executive Committee was increased to seven members instead of five, as heretofore.

The newly elected President was called upon for a speech, and responded as follows:

Mr. President and Gentlemen of the Bar Association:

This is indeed a rare distinction you have conferred upon me, and one I appreciate very much. It comes, however, as a great surprise, and entirely unsolicited and unexpected upon my part, and while I feel deeply and sensibly the great honor you have thus bestowed upon me, yet I have many friends here whom I would rather have seen honored with this position than myself, but I accept it, and will endeavor to act in such a way as to bring about the best results, and no discredit to the Association.

I am indeed proud to see the progress we have already made in the Association in the last six or seven years. The first meetings we had in Little Rock were very poorly attended; but few members of our profession seemed to manifest much interest in the Association, but with the perseverance of a few members of the bar, we feel that the permanency and success of the Association is now assured. Again allow me to thank you for the honor you have conferred upon me.

The question of place of meeting next year was raised, but no action was taken, because that matter is left to the Executive Committee by the Constitution.

Upon motion, it was resolved that, in view of the success of the present joint meeting, the Executive Committee be authorized to endeavor to arrange other such joint meetings with one or more of the Bar Associations of the surrounding States.

Upon motion, the following resolution was adopted:

Resolved, That the Executive Committee of this Association convey to the Executive Committee of the Texas Association an expression of the pleasure we have had, and our appreciation of the very great benefit we have derived from the joint meeting with them, and express the hope that in the future similar meetings may be held.

A rising vote of thanks to the press, telephone and telegraph companies, railroads, Elks, street car companies, the ladies and local Bar Association of Texarkana, and officers of the Association was given.

The newly elected President made a special request that the members bring their wives with them to the next meeting.

Upon motion, the Association adjourned sine die.

[NOTE.—It will be of interest to the members to know that the Executive Committee have arranged a meeting with the Bar Association of Tennessee, to be held at Memphis some time the latter part of next May.—Secretary.]

BAR ASSOCIATION OF ARKANSAS.

PRESIDENTS SINCE ORGANIZATION.

1899.

U. M. Rose..... Little Rock.

1900.

Henry C. Caldwell..... Little Rock.

1900-1.

Sterling R. Cockrill..... Little Rock.

1901-2.

Thomas B. Martin..... Little Rock.

1902-3.

George B. Rose..... Little Rock.

1903-4.

James F. Read..... Fort Smith.

1904-5.

Allen Hughes..... Jonesboro.

1905-6.

Joseph M. Stayton..... Newport.

1906-7.

Joseph W. House..... Little Rock.

OFFICERS AND COMMITTEES.

1906-1907.

JOSEPH W. HOUSE.... President Little Rock.
WILLIAM H. ARNOLD.. Vice-President Texarkana.
ROSCOE R. LYNN.....Secretary Little Rock.
P. C. DOOLEY.....Treasurer Little Rock.

VICE-PRESIDENTS FOR EACH JUDICIAL CIRCUIT.

John Gatling, 1st.....Forrest City.
J. T. Coston, 2d.....Osceola.
John B. McCaleb, 3d.....Batesville.
N. B. Williams, 4th.....Fayetteville.
R. B. Wilson, 5th.....Russellville.
W. S. McCain, 6th.....Little Rock.
W. H. Martin, 7th.....Hot Springs.
T. C. McRae, 8th.....Prescott.
W. C. Rodgers, 9th.....Nashville.
W. S. Goodwin, 10th.....Warren.
W. F. Coleman, 11th.....Pine Bluff.
J. B. McDonough, 12th.....Fort Smith.
J. W. Warren, 13th.....Lewisville.
G. J. Crump, 14th.....Harrison.
Sam R. Chew, 15th.....Van Buren.
E. G. Schoonover, 16th.....Pocahontas.
T. C. Trimble, 17th.....Lonoke.

Executive Committee.

Ashley Cockrill, Chairman..... Little Rock.
E. A. McCulloch..... Little Rock.
Chas. T. Coleman..... Little Rock.
Joseph M. Stayton.....Newport.
W. H. Arnold.....Texarkana.

P. C. Dooley	Little Rock.
Roscoe R. Lynn	Little Rock.

Committee on Law and Law Reform.

W. L. Terry, Chairman	Little Rock.
W. V. Tompkins	Prescott.
J. F. Sellers	Morrilton.
W. J. Lamb	Osceola.
J. H. Crawford	Arkadelphia.

Committee on Judicial Administration.

Joseph M. Hill, Chairman	Little Rock.
Frank Smith	Marion.
J. M. Carter	Texarkana.
Daniel Hon	Waldron.
F. D. Fulkerson	Batesville.

Committee on Judiciary.

F. M. Rogers, Chairman	Arkansas City.
H. L. Fitzhugh	Fort Smith.
A. J. Witt	Pocahontas.
R. G. Harper	El Dorado.
J. T. Sifford	Camden.

Committee on Education and Admission to the Bar.

John Fletcher, Chairman	Little Rock.
H. B. McKenzie	Prescott.
H. Coleman	DeWitt.
J. Merrick Moore	Little Rock.
M. Danaher	Pine Bluff.

Committee on Appeals and Grievances.

W. F. Kirby, Chairman	Texarkana.
J. F. O'Melia	Fort Smith.

Sam M. Casey.....	Batesville.
Henry Moore, Jr.....	Texarkana.
P. O. Thweatt.....	Helena.

Committee on Professional Ethics.

Chas. D. Greaves, Chairman.....	Hot Springs.
Joe T. Robinson.....	Lonoke.
James H. Stevenson.....	Little Rock.
C. B. Moore.....	Texarkana.
John W. Stayton.....	Newport.

Committee on Memorials.

W. S. McCain, Chairman.....	Little Rock.
H. S. Powell.....	Camden.
J. W. Story.....	Harrison.
J. W. Warren.....	Lewisville.
Harry M. Woods.....	Augusta.

Committee on Nominations.

Joseph M. Stayton, Chairman.....	Newport.
T. M. Mehaffy.....	Little Rock.
W. F. Coleman.....	Pine Bluff.
Allen Hughes.....	Jonesboro.
W. S. Goodwin.....	Warren.

Committee on Publication.

Roscoe R. Lynn, Chairman.....	Little Rock.
C. H. Henderson.....	Pocahontas.
Wm. H. Askew.....	Magnolia.
June P. Wooten.....	Little Rock.
Menefee House.....	Little Rock.

LIST OF MEMBERS.

1906-1907.

Adamson, W. C.....	Little Rock.
Alley, J. I.....	Mena.
Andrews, P. R.....	Augusta.
Armistead, Henry M.....	Little Rock.
Arnold, W. H.....	Texarkana.
Askew, William H.....	Magnolia.
Atkinson, W. E.....	Little Rock.
Bacon, Pratt P.....	Texarkana.
Barnes, James K.....	Fort Smith.
Barnhill, George	Corning.
Battle, B. B.....	Little Rock.
Beakley, J. N.....	Walnut Ridge.
Berry, L. P.....	Marion.
Black, James F.....	Texarkana.
Blackwood, J. W.....	Little Rock.
Block, J. D.....	Paragould.
Bradshaw, De E.....	Little Rock.
Bridges, F. G.....	Pine Bluff.
Bishop, J. W.....	Nashville.
Brizzolara, James	Fort Smith.
Brouse, W. D.....	Sheridan.
Brown, E. F.....	Jonesboro.
Brown, F. E.....	Des Arc.
Bunn, H. G.....	El Dorado.
Busbee, Thomas	Little Rock.
Bush, J. O. A.....	Prescott.
Butler, Turner	Hamburg.
Byrne, L. A.....	Texarkana.
Campbell, S. D.....	Newport.
Cantrell, D. H.....	Little Rock.
Carmichael, J. H.....	Little Rock.
Carter, J. M.....	Texarkana.

Casey, Sam M.....	Batesville.
Chapline, G. M.....	Lonoke.
Chastain, J. D.....	Fort Smith.
Chew, Sam R.....	Van Buren.
Claiborne, William L.....	Hot Springs.
Clarke, James P.....	Little Rock.
Clayton, Powell	Little Rock.
Cobb, M. S.....	Hot Springs.
Cochran, James	Paris.
Cockrill, Ashley	Little Rock.
Cohn, Morris M.....	Little Rock.
Coleman, C. T.	Little Rock.
Coleman, H.	De Witt.
Coleman, W. F.	Pine Bluff.
Compton, W. A.....	Marianna.
Conway, J. D.....	Texarkana.
Cook, John N.	Texarkana.
Cook, J. D.	Texarkana.
Coston, J. T.....	Osceola.
Cotham, C. T.....	Hot Springs.
Cox, John Bruce.....	Little Rock.
Cracraft, George K.....	Grand Lake.
Cravens, J. E.....	Clarksville.
Crawford, J. H.	Arkadelphia.
Crawford, J. W.	Pine Bluff.
Crawford, T. D.	Little Rock.
Crenshaw, P. H.....	Pocahontas.
Crump, G. J.....	Harrison.
Cunkle, A. C.....	Fort Smith.
Curl, A.	Hot Springs.
Danaher, M.	Pine Bluff.
Davidson, B. R.	Fayetteville.
Davidson, Sam H.	Evening Shade.
Dodge, Frank H.....	Little Rock.
Dooley, P. C.....	Little Rock.

Duffie, A. M.	Malvern.
Dunaway, J. G.	Little Rock.
Elliott, John M.	Pine Bluff.
Falconer, W. A.	Fort Smith.
Feazel, W. P.	Nashville.
Fitzhugh, H. L.	Van Buren.
Flenniken, Aylmer	El Dorado.
Fletcher, John	Little Rock.
Fraser, Garner	Clinton.
Frauenthal, Sam	Conway.
Friedell, E. F.	Texarkana.
Fulk, Gus M.	Little Rock.
Fulk, Guy	Little Rock.
Fulkerson, F. D.	Batesville.
Gatling, John	Forrest City.
Garrison, A. M.	Texarkana.
Gaughan, T. J.	Camden.
Gautney, J. F.	Jonesboro.
Gillette, J. A.	Atkins.
Grace, A. B.	Pine Bluff.
Gray, J. A.	Little Rock.
Greaves, C. D.	Hot Springs.
Greenlee, C. F.	Brinkley.
Hall, Anthony	Paris.
Hare, T. E.	Vanndale.
Harper, R. G.	El Dorado.
Hart, Jesse C.	Little Rock.
Hawkins, N. T.	Morrilton.
Hawthorne, D. K.	Jonesboro.
Hawthorne, J. C.	Jonesboro.
Hays, G. A.	Texarkana.
Head, James D.	Texarkana.
Heard, George M.	Little Rock.
Hemingway, W. E.	Little Rock.
Henderson, J. P.	Hot Springs.
Henderson, Clarence H.	Pocahontas.

Herrn, Thos. I.	Evening Shade.
Hicks, John T.	Little Rock.
Hill, Joseph M.	Little Rock.
Hogue, James E.	Hot Springs.
Holland, John H.	Greenwood.
Hon, Daniel	Waldron.
Hopson, D.	Corning.
Horner, E. C.	Helena.
Hotze, Frederick	Little Rock.
Hughes, S. P. (deceased)	Little Rock.
House, J. W.	Little Rock.
House, Meniffee	Little Rock.
Huff, C. Floyd.	Hot Springs.
Hughes, Allen	Jonesboro.
Humphries, George T.	Salem.
Hutton, H. N.	Marianna.
Jackson, J. H.	DeQueen.
Johnson, B. S.	Little Rock.
Jones, Dan W.	Little Rock.
Jones, James K.	Hope.
Jones, John B.	Little Rock.
Jones, Paul.	New York, N. Y.
King, D. L.	New Lewisville.
King, D. L.	Hardy.
Kinsworthy, E. B.	Little Rock.
Kirby, W. F.	Texarkana.
Lamb, W. J.	Osceola.
Lankford, Eugene	DeVall's Bluff.
Latta, G. G.	Hot Springs.
Leming, A. G.	Waldron.
Lewis, B. A.	Texarkana.
Loughborough, J. F.	Little Rock.
Lynn, Roscoe R.	Little Rock.
Maberry, A. F.	Cotton Plant.
Maloney, L. C.	Little Rock.
Mann, R. M.	Texarkana.

Manning, M. J.	Clarendon.
Marsh, Neill C.	El Dorado.
Martin, Robert	Little Rock.
Martin, T. B.	Little Rock.
Martin, William H.	Hot Springs.
Martin, W. R.	Fort Smith.
Martineau, J. E.	Little Rock.
Mathes, Ed H.	Jonesboro.
Matlock, E. L.	Van Buren.
McCain, W. S.	Little Rock.
McCaleb, Jno. B.	Batesville.
McClintock, J. M.	DeVall's Bluff.
McClure, John	Little Rock.
McCollum, James H.	Hope.
McCulloch, E. A.	Little Rock.
McCulloch, P. D.	Marianna.
McDonald, Fred W.	Little Rock.
McDonough, James B.	Fort Smith.
McHaney, E. L.	Little Rock.
McKay, C. W.	Magnolia.
McKenzie, H. B.	Prescott.
McMillan, D.	Arkadelphia.
McMillan, D. W.	Hope.
McMillan, J. H.	Arkadelphia.
McRae, T. C.	Prescott.
Mehaffy, T. M.	Little Rock.
Miles, Lovick P.	Fort Smith.
Miles, Oscar L.	Fort Smith.
Montgomery, J. M.	New Lewisville.
Moore, B. L.	Van Buren.
Moore, C. B.	Texarkana.
Moore, Henry, Jr.	Texarkana.
Moore, Henry	Texarkana.
Moore, John I.	Helena.
Moore, J. Merrick.	Little Rock.
Moore, John M.	Little Rock.

Moose, W. L.....	Morrilton.
Morrison, H. R. (deceased).....	Hot Springs.
Morton, T. B.....	Fordyce.
Moss, E. E.....	Little Rock.
Myers, H. H.....	Little Rock.
Neill, Ernest	Batesville.
Norman, J. C.....	Hamburg.
Norton, N. W.....	Forrest City.
Norwood, Hal L.....	Mena.
Oglesby, Ira D.....	Fort Smith.
Oldfield, W. A.....	Batesville.
Oldham, Kie	Little Rock.
Oliver, G. B.....	Corning.
Olney, Mark P.....	Mena.
O'Melia, J. F.....	Fort Smith.
Pace, Frank	Harrison.
Pace, Troy	Harrison.
Pierce, E. B.....	Little Rock.
Pemberton, W. H.....	Little Rock.
Pettigrew, T. A.....	Charleston.
Pope, G. G.....	Texarkana.
Powell, H. S.....	Camden.
Powers, R. C.....	Little Rock.
Prickett, Wright	Mena.
Pryor, T. B.....	Greenwood.
Pugh, George B.....	Little Rock.
Quarles, Greenfield	Helena.
Quinn, Frank S.....	Texarkana.
Ratcliffe, W. C.....	Little Rock.
Read, James F.....	Fort Smith.
Reid, Charles C.....	Morrilton.
Reyburn, Sam W.....	Little Rock.
Rhoton, Lewis	Little Rock.
Riddick, J. E.....	Little Rock.
Robertson, Thomas N.....	Little Rock.
Robinson, Joe T.....	Lonoke.

Rodgers, W. C.	Nashville.
Rogers, F. M.	Arkansas City.
Rogers, John H.	Fort Smith.
Rogers, Robert L.	Little Rock.
Roleson, H. F.	Marianna.
Rose, George B.	Little Rock.
Rose, J. M.	Little Rock.
Rose, U. M.	Little Rock.
Rowe, Styles T.	Greenwood.
Sain, J. G.	Nashville.
Sain, D. B.	Nashville.
Schoonover, E. G.	Pocahontas.
Sellers, J. F.	Morrilton.
Shaver, J. D.	Mena.
Sifford, J. T.	Camden.
Sikes, W. W.	Rogers.
Simms, John Field.	Texarkana.
Smead, H. P.	Camden.
Smith, W. B.	Little Rock.
Smith, Frank	Marion.
Southmayd, L. H.	Van Buren.
Stayton, John W.	Newport.
Stayton, Joseph M.	Newport.
Steel, Will	Texarkana.
Stevens, J. Y.	Magnolia.
Stevenson, James H.	Little Rock.
Story, J. W.	Harrison.
Stuart, B. J.	Winthrop.
Stuckey, M. M.	Newport.
Summers, J. F.	Augusta.
Sumpter, O. H.	Hot Springs.
Teague, C. V.	Hot Springs.
Terry, D. D.	Little Rock.
Terry, W. J.	Little Rock.
Terry, W. L.	Little Rock.
Thweatt, P. O.	Helena.

Tompkins, W. V.....	Prescott.
Trieber, Jacob	Little Rock.
Trimble, T. C.	Lonoke.
Trimble, T. C., Jr.....	Lonoke.
Turner, Jesse	Van Buren.
Vance, E. H., Jr.....	Malvern.
Vaughan, George	Little Rock.
Vinson, Baldy	Little Rock.
Wallace, J. G.....	Russellville.
Warner, C. E.....	Fort Smith.
Warren, J. W.....	Lewisville.
Waters, Charles C.....	Little Rock.
Webber, George	Texarkana.
Webber, T. E.	Texarkana.
Whipple, Durand.....	Little Rock.
Whipple, W. G.	Little Rock.
Wiley, R. E.....	Little Rock.
Williams, George W.	Little Rock.
Williams, J. E.	Little Rock.
Williams, Nathan B.	Fayetteville.
Wilson, R. B.....	Russellville.
Winham, Allen	Texarkana.
Winfield, E. W.....	Little Rock.
Wingo, Otis T.....	DeQueen.
Witt, A. J.....	Pocahontas.
Wood, C. D.	Little Rock.
Wood, Harry	Augusta.
Wood, J. B.	Hot Springs.
Wooten, J. P.....	Little Rock.

Honorary Members.

Brewer, David J.....	Washington, D. C.
Caldwell, Henry G.....	Los Angeles, Cal.
Spencer, Selden P.....	St. Louis, Mo.

DECEASED MEMBERS SINCE REORGANIZATION IN 1900.

1900—Samuel W. Williams.....Little Rock.
1900—John A. Williams.....Little Rock.
1901—Sterling R. Cockrill.....Little Rock.
1901—Robert B. Williams.....Texarkana.
1901—John D. Kimball.....Hot Springs.
1903—Francis Johnson.....Little Rock.
1903—O. W. Watkins.....Eureka Springs.
1904—Geo. T. Dodge.....Little Rock.
1904—L. C. Balch.....Little Rock.
1904—J. E. Gatewood.....Lonoke.
1905—Joseph W. Martin.....Little Rock.
1905—Arthur Neill.....Little Rock.
1905—S. S. Wassell.....Little Rock.
1905—Thomas Boles.....Fort Smith.
1905—Thomas Orr.....Texarkana.
1905—X. J. Pindell.....Dumas.
1906—Simon H. Hughes.....Little Rock.
1906—H. R. Morrison.....Hot Springs.

ADDRESSES AND PAPERS.

1900.—JANUARY MEETING.

Judge U. M. Rose, Little Rock, President's Address, "Beccaria."

W. C. Rodgers, Nashville, "Right of the States to Regulate Trusts and Monopolies."

Morris M. Cohn, Little Rock, "Some Thoughts on the Constitutional Framework of Government in the United States."

Geo. B. Rose, Little Rock, "Uniformity or Diversity."

Joseph M. Hill, Fort Smith, "The Trusts and Their Kinfolk."

1900.—MAY MEETING.

B. R. Davidson, Fayetteville, "Some Tendencies of the Age Against Which We Should Possibly Be On Our Guard."

John A. Williams, Little Rock, annual address, "Lawyers."

Jas. B. McDonough, Fort Smith, "The Influence of the Roman Law Upon the Common Law of England and America."

A. B. Grace, Pine Bluff, "Change of Venue and Verdict of Jury."

1901.

Joseph M. Hill, Fort Smith, "Life and Character of Sterling R. Cockrill."

W. S. McCain, Little Rock, "Ought Punishment For Crime Be Abolished?"

Ashley Cockrill, Little Rock, "History and Evils of Anti-trust Fire Insurance Legislation."

Geo. B. Rose, Little Rock, "Literature and the Bar."

E. W. Winfield, Little Rock, "Some Excellencies of the Late Chief Justice Cockrill."

W. H. Arnold, Texarkana, "Disqualification of Judges in Certain Cases."

1902.

Morris M. Cohn, Little Rock, "Some Thoughts on the Development of the Police Power."

W. C. Rodgers, Nashville, "Principle vs. Precedent."

Jesse Turner, Van Buren, "The Case of Macaulay vs. Poe."

J. C. Norman, Hamburg, "The Alleged Decadence of the American Bar."

1903.

Geo. B. Rose, Little Rock, President's Address, "The Bar of Early Arkansas."

T. J. Gaughan, Camden, "The Benefit of Corporations to Mankind."

S. D. Campbell, Newport, "Some Needed Reforms in the Criminal Law."

Lovick P. Miles, Fort Smith, "Lethargy in the Work of State Development."

J. F. Sellers, Morrilton, "The Power of Courts and Juries to Change the Law."

1904.

Jas. F. Read, Fort Smith, President's Address, "Our Association."

Daniel Hon, Waldron, "Probate Courts."

1905.

Allen Hughes, Jonesboro, President's Address, "The Condensation of the Law."

Henry D. Ashley, Kansas City, Mo., Annual Address, "The Effect on American Jurisprudence of the Doctrine of Judicial Precedent."

Jacob Trieber, Little Rock, "The Jurisdiction of Federal Courts in Actions in Which Corporations Are Parties."

Ashley Cockrill, Little Rock, "The Case of Northern Assurance Company vs. Grandview Building Association, 183 U. S. Rep."

CONSTITUTION AND LAWS.

ASSOCIATION RULES.

ARTICLE 1. The name of this Association is the Bar Association of Arkansas. Its objects are to uphold the honor of the legal profession, inculcate sound professional ethics, promote the administration of justice and the science of jurisprudence, and establish and maintain cordiality and fraternity among lawyers.

ART. 2. The officers of this Association shall be President, a First Vice-President, one Vice-President for each Judicial Circuit of the State of Arkansas, a Secretary and a Treasurer, who shall hold office for one year and until their successors are elected, whose terms of office shall begin at the close of the annual meeting at which they may be elected. The President shall appoint a committee consisting of five members, whose duty it shall be to nominate and present the names of officers at the next ensuing annual meeting of the Association; provided that the committee appointed at this meeting shall nominate and present to the meeting the names of officers for the ensuing year.

ART. 3. The Secretary, Treasurer and three members, to be chosen annually, shall constitute an Executive Committee, who shall meet quarterly; a majority thereof forming a quorum for business. The committee shall have full power to do anything necessary to be done for the promotion and well-being of the Association during recess or vacation of the same, subject to revision of the Association at the next annual meeting; also to arrange programs and rules for the regulations of the business of the Association.

ART. 4. All persons who have been enrolled by the Secretary shall be members of this Association, and hereafter every member of the Bar of Arkansas, licensed to practice in the circuit courts, in good standing, shall be eligible to membership. A majority of

the Executive Committee may admit new members, but their action, in all cases, shall be liable to be revoked by the Association at any pending meeting, or the next regular meeting.

ART. 5. The President, or, in his absence, the Vice-President, and ten members of the Association shall constitute a quorum for the transaction of business, and any less number may adjourn the meeting from time to time for the purpose of securing a quorum.

ART. 6. The annual meeting of the Association shall be held on the last Thursday and Friday in May, at 10 o'clock a. m., in the city of Little Rock, or at such other time and place as the Executive Committee may designate, unless otherwise directed by the Association.

ART. 7. The following standing committees shall be appointed by the President within thirty days after the adjournment of each annual meeting: On Law and Law Reform, on Judicial Administration, on Education and Admission to the Bar, on Appeals and Grievances, on Publication, on Professional Ethics, on Judiciary, on Memorials.

ART. 8. The dues for membership shall be \$3 per annum.

PROCEEDINGS

OF THE

TWENTY-FIFTH ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION

HELD IN THE

CITY OF TEXARKANA,

JULY 11 AND 12, 1906.



A. L. BEATY,
PRESIDENT TEXAS BAR ASSOCIATION, 1906-07.

PROCEEDINGS
OF THE
TWENTY-FIFTH ANNUAL MEETING
OF THE
TEXAS LAR ASSOCIATION
HELD AT
CITY OF SAN ANTONIO, TEXAS, 1900

PROCEEDINGS OF THE MEETING

At the Annual Session of the Texas Lar Association, held at the City of San Antonio, Texas, on the 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 1900.

The following members of the Association were present: (List of names follows)

The following members of the Association were absent: (List of names follows)

The following members of the Association were deceased: (List of names follows)

The following members of the Association were elected: (List of names follows)

The following members of the Association were re-elected: (List of names follows)

The following members of the Association were elected to the following offices: (List of names follows)



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PROCEEDINGS
OF THE
TWENTY-FIFTH ANNUAL SESSION
OF THE
TEXAS BAR ASSOCIATION
HELD IN THE
CITY OF TEXARKANA, JULY 11 AND 12, 1906.

SECOND DAY.—AFTERNOON SESSION.

The Twenty-fifth Annual Session of the Texas Bar Association was held in the city of Texarkana, commencing Wednesday, July 11, 1906.

The Association was called to order by President H. M. Garwood, at 3 o'clock, who said:

GENTLEMEN: Without wasting time with preliminary remarks, I will call the Association to order and announce that the first item upon the program of business is the report of the Board of Directors.

Mr. R. E. L. Saner, Chairman of the Board of Directors, thereupon presented their report, which, on motion, was adopted. The report being as follows:

TEXARKANA, TEXAS, July 10, 1906.

To Hon. H. M. Garwood, President of the Texas Bar Association:

The Board of Directors of the Texas Bar Association respectfully submit the following report:

We recommend that the present meeting of the Association remain in separate session upon the afternoons of the second and third days of the joint sessions of the Arkansas and Texas Bar meeting; that all of the first day and the mornings of the second and third days be given to the joint

work of the two Associations; that the afternoons of the second and third days be given to the separate work of each Association, and thereafter, until the business before the Association is disposed of, and that the following program for the separate session be adopted:

PROGRAM OF SEPARATE SESSION TEXAS BAR ASSOCIATION.

SECOND DAY—WEDNESDAY, JULY 11, 2 P. M.

1. Nomination and election of members.
2. Report of Secretary.
3. Report of Treasurer.
4. Report of Committee on Jurisprudence and Law Reform, Judge Yancey Lewis, Chairman, Dallas.
5. Report of Committee on Judicial Administration and Remedial Procedure, Mr. Geo. E. Miller, Chairman, Fort Worth.
6. Report of Committee on Legal Education and Admission to the Bar, Judge W. S. Simkins, Chairman, Austin.
7. Report of Committee on Commercial Law, Henry C. Coke, Chairman, Dallas.
8. Report of Special Committee on Amended Code of Civil Procedure, Mr. Rhodes S. Baker, Chairman, Dallas.
9. Report of Committee on Grievances and Discipline, Mr. Jno. T. Craddock, Chairman, Greenville.

THIRD DAY—THURSDAY, JULY 12, 2 P. M.

1. Report of Committee on Criminal Law, Judge W. C. Wear, Chairman, Hillsboro.
2. Report of Committee on Deceased Members, Judge Norman G. Kitzell, Chairman, Houston.
3. Report of Committee on Organization of County Bar Associations, Mr. M. W. Davis, Chairman, San Antonio.
4. Report of Committee on Publication, Judge A. E. Wilkinson, Chairman, Austin.
5. Report of Delegates to American Bar Association.
6. Election of officers.
7. Election of Directors.
8. Selection of next place of meeting.
9. Miscellaneous and unfinished business.

R. E. L. SANER, Chairman;
EDWARD F. HARRIS,
WM. H. BURGESS,
W. L. ESTES,
D. E. SIMMONS,
Directors.

PRESIDENT GARWOOD: In accordance with the program just adopted, the first business before us will be the nomination and election of new members. The Directors will please present their report upon the applications for membership.

Mr. Saner, on behalf of the Directors, read the report of the Board upon the applicants.

THE PRESIDENT: You have heard the report upon applications for membership. I believe that by the Constitution and By-Laws all elections must be made by ballot, and I presume the best way will be, if there is no objection, to ask the Secretary to cast the vote of the Association.

On motion, the report of the Directors was received and the Secretary requested to cast the ballot of the Association for the election to membership of the applicants named therein.

The report of the Directors and names of the members so elected is as follows:

To Hon. H. M. Garwood, President of the Texas Bar Association:

The Board of Directors beg leave to report that the following persons have applied for admission to membership in this Association, and the Board of Directors having duly considered the applications and found the applicants qualified for membership, hereby respectfully recommend that they be elected to membership in the Association.

Those recommended are as follows: W. A. Keeling, Groesbeck; T. W. Gregory, Austin; S. B. Dabney, Houston; Houston Wood, Dallas; J. W. McLendon, Austin; Walter P. Napier, San Antonio; J. W. Hill, San Angelo; J. M. Wagstaff, Abilene; A. H. Kirby, Abilene; John T. Wheeler, Galveston; Claude Pollard, Austin; Ben Powell, Huntsville; R. W. Rodgers, Texarkana; Jewel P. Lightfoot, Austin; Geo. J. Armistead, Texarkana; Wm. B. Figures, Atlanta; W. T. Armistead, Jefferson; A. Newt. Spivey, Atlanta; J. E. Garland, Texarkana; Sam H. Smelser, Texarkana; Robert R. Lockett, Texarkana; J. M. Talbot, Dallas; R. D. Hart, Texarkana; J. Q. Mahaffey, Texarkana; W. S. Thomas, Texarkana; D. T. Leary, Texarkana; R. E. Sexton, Marshall; R. P. Dorrough, Tyler; Howard F. O'Neal, Atlanta; J. A. Hurley, Texarkana; W. D. Gorden, Beaumont; A. L. Davis, Beaumont; Richard B. Levy, Longview, C. M. Chambers, Clarksville;

Edward G. Perkins, Dallas; Jno. W. Spivey, Marlin; Jno. C. Robertson, Dallas; W. W. Ballew, Corsicana; George G. Clough, Galveston.

Respectfully submitted,

R. E. L. SANEB, Chairman;
EDWARD F. HARRIS,
WM. H. BURGESS,
W. L. ESTES,

Directors.

THE PRESIDENT: The report of the Secretary is next in order. The Secretary read his report, which it was announced had been examined and approved by the Directors.

On motion of Mr. Lewis the report was received and approved.

The Secretary's report, omitting the several schedules and itemized accounts attached to and referred to therein, was as follows:

To the President and Board of Directors of the Texas Bar Association:

Your Secretary respectfully submits the following report of his transactions during the past year. His account of receipts and expenditures covers the period from his last report, which ended with the 30th day of June, 1905, to the 30th of June, 1906, inclusive. It does not, however, include the numerous remittances of dues received since that date, in response to his annual notice of this meeting, mailed to the members, and giving to each notice of his standing in regard to the payment of dues.

During the time mentioned, your Secretary has collected and charges himself with the following sums:

Initiation fees	\$ 315 00
Annual dues for the year 1902	15 00
Annual dues for the year 1903	65 00
Annual dues for the year 1904	150 00
Annual dues for the year 1905	367 50
Annual dues for the year 1906	57 50
From sales of Proceedings of the Association	39 64
Total	<hr/> \$1,009 64

Against this your Secretary asks credit as follows:

Petty cash expended, as shown by accompanying itemized statement (chiefly postage)	\$ 56 55
Salary as Secretary, July 1, 1905, to July 1, 1906	120 00
Paid Treasurer, as per his receipt	833 09
Total	<hr/> \$1,009 64

Accompanying this report your Secretary submits his account showing the standing of all members in regard to payment on June 30, 1906, and a schedule showing all amounts collected by him during the year, by whom paid, and for what purpose, which, with his books of receipt stubs, have been duly examined and approved by the Directors.

In regard to the matter of republication of the back numbers of the Proceedings which are out of print, he would further report that, in accordance with the resolution adopted at your last meeting, the Directors authorized him to have republished the Proceedings for the year 1901, which was done at a cost of \$150, which sum was by order of the Directors advanced out of the general funds of the society. But one other, that for 1889, will be necessary to reprint, and the cost of this will not exceed \$75. Since the reprint made it possible to furnish complete files, sales have been made to the amount of \$39.64, as shown by the foregoing report. No effort has as yet been made to advise libraries interested in such matters that full files can now be had, and it is probable that if this were done the sales will be sufficient to reimburse the general fund of the Association for the expense of reprinting both of these numbers.

Respectfully submitted,

A. E. WILKINSON,
Secretary.

THE PRESIDENT: Next in order is the report of the Treasurer.

In the absence of Treasurer Williams, his report, which had been submitted to and approved by the Board of Directors, was read by the Secretary, and, on motion, was received and approved.

The report, omitting the vouchers which accompanied it, was as follows:

TEXARKANA, ARK., July 10, 1906.

To the President and Board of Directors of the Texas Bar Association:

GENTLEMEN: I have the honor to report to you the transactions of your Treasurer since your last annual meeting, as follows, to wit:

Balance on hand as shown by report for 1905.....	\$ 486 61
Paid in by the Secretary.....	833 09
Total	\$1,319 70

From which the following deductions should be made, to wit:

Paid Von Boeckmann-Jones Co., September 13, 1905.....	\$ 3 50
Paid O. S. Gresham, stenographer, September 13, 1905.....	40 00
Paid Sherman Printing Co., September 13, 1905.....	2 50
Paid Von Boeckmann-Jones Co., December 21, 1905.....	289 60

Paid Von Boeckmann-Jones Co., February 19, 1906.....	26 00
Paid Von Boeckmann-Jones Co., April 26, 1906.....	150 00
Total ..	<hr/> \$ 511 60
Leaving a balance on hand of.....	<hr/> \$ 808 10

SUMMARY.

Total receipts, with balance at last report.....	\$1,319 70
Total disbursements ..	<hr/> 511 60
Amount now in treasury.....	<hr/> \$ 808 10
All of which is respectfully submitted.	

WM. D. WILLIAMS,
Treasurer.

THE PRESIDENT: The next item on the program is the report of the Committee on Jurisprudence and Law Reform, Judge Yancey Lewis, Chairman.

MR. LEWIS: I wish to state that I did not receive the communication of the committee until Monday and did not have time to complete the report. Part of it is in the language of Judge Ogden, of San Antonio:

To Hon. H. M. Garwood, President of the Texas Bar Association:

Your Committee on Jurisprudence and Law Reform beg to report:

The administration of the law may be regarded in two ways: (1) It may be considered a remedial system whose constant purpose is to attain right and justice in causes between men. (2) In the language of our Mr. Moroney, as a game played by specially trained individuals, in which there is no concern for results, but the utmost concern that the game be played according to the rules.

If the first view be indulged too exclusively, it leads to a disposition to deal with cases individually and to disregard settled rules and orderly procedure. If the second be carried too far, it leads to artificial distinctions and technical refinements and the defeat of justice. The endeavor to strike the true mean, to secure a proper regard for rule and a proper regard for just result is the insoluble and perpetual problem of jurisprudence.

I.

Your committee are of the opinion that in our present administration of the law the tendency has become somewhat too pronounced to ask,

"was the rule followed?" not, "is the result right?" The majority of the committee, therefore, recommend the adoption of a provision found in most of the code States and in many which have not adopted the code: "The court shall in every stage of an action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgments shall be reversed or affected by reason of such error or defect." (Favoring—Lewis, Brown, Burgess.)

II.

A majority of your committee is of the opinion that it is fundamentally just and wise that in the disposition of causes by appellate tribunals parties should be held strictly to their trial court theories; that it is the right of litigants to have the judgment of the trial judge upon such grounds as they may suggest to him, but that it is not their right to present one theory of the cause in the trial court and have a ruling of the trial judge upon such theory and to procure a reversal upon a ground or theory that was not brought to the trial judge's attention and not ruled adversely by him; that such result is not just to the adverse party and is eminently unjust to the trial judge and operates to defeat the true purpose of an appeal. Accordingly, we recommend the adoption of the following rule of appellate court practice: "No error shall be assigned upon a writ of error or appeal from the trial court nor be considered by the appellate court unless the record shows that such error was called to the attention of the trial court in the motion for a new trial." This rule, apart from its inherent justice, would have two beneficial effects: (1) That the court would have the opportunity of correcting the error by granting a new trial, thus saving the costs, time and labor of appeal. (2) It would call the attention of the court and counsel to the very point made, and the statement of facts and the record would be prepared with reference thereto. (Favoring—Lewis, Brown, Burgess.)

III.

The decisions of the Supreme Court of this State on the statute which prohibits the district judge to comment upon the weight of the evidence in his charge have gone to that extent that the trial courts are in constant dread of violating that inhibition, and their charges are punctuated with "if any" to such an extent as to render them absurd and many times to destroy the real meaning and force of the charge. It is true also that this provision of the statute is one of the most fruitful causes of reversal in the appellate courts and that such reversals occur often when it is impossible to believe that the jury could have been at all influenced by the supposed comment, and many times when the ordinary mind is not able to perceive that there was such comment at all, and the judicial mind is

only able to establish its existence by highly refined and highly unsatisfactory reasoning.

Believing that the operation of this statute as it has been enforced in the superior courts tends to delay and defeat justice, a majority of your committee recommend that Article 1317 of the Revised Civil Statutes be amended by the addition of the following proviso: "Provided, no judgment shall be reversed upon appeal because of a charge or comment on the weight of the evidence by the trial judge, if in the conclusion of the court's charge the jury were informed that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses; that it was not the province of the court to charge or comment on the weight of the evidence, and if it had done so inadvertently, the jury should disregard it." (Favoring—Lewis, Brown, Ogden. Opposing—Burgess.)

A minority of the committee oppose this recommendation, believing that the idea that the comment upon the weight of the evidence may be rendered harmless by a statement on the part of the court that it was inadvertent and the jury should disregard it, while plausible in theory, is not sound in practice; that the jury as a general proposition is very much influenced by the opinion of the court on matters of fact and that the way to escape this influence is to make the comment, made intentionally or inadvertently, ground for reversal.

The Chairman of your committee expresses an individual opinion when he states that, in his judgment, the inhibition upon the trial judge to comment upon the weight of the evidence should be entirely withdrawn with reference to certain matters, and that it should be made the judge's duty to explain the rules of law relating to badges of fraud in cases of fraud and fraudulent conveyance, and also to state the established legal presumptions arising from appropriate facts. It must be the observation of most practitioners that our law is exceedingly weak, not to say hopelessly futile, in the uncovering of fraud and fraudulent conveyances; and it seems a strange result of legislation that a clause simply forbidding the court to comment upon the weight of evidence should strike down all the carefully wrought doctrines of presumption in the law of evidence.

IV.

Your committee are of the belief that the true relation of attorneys to the court is that of aids and assistants in the administration of the law; that, because of this relation, there is imposed upon counsel on both sides in any case the obligation of candor and the duty to aid the court by proper suggestions as to the correction of errors into which it may have fallen; that, because of this relation of counsel to the court, it is the duty of counsel to bring to the court's attention any error in its charge by proper objection and exception; that, if this view does not prevail, the

opposite view naturally places counsel in the attitude, by silence, of permitting the court to fall into error, not objected to, but of which they may complain in the event they are disappointed in having a verdict returned in their favor; that this view at once changes the relation of the attorney to the court, as it has changed it in this State, makes the lawyer, not an aid, by candor and free disclosure, to guide the court aright, but an adversary, by silence or strategy to lead the court into error, if he can; further, that the elemental proposition, that it is just that parties should have an adjudication upon their trial court theories and not secure reversals of the trial court upon their afterthoughts, also operates to require that counsel should not be silent and acquiescent, but should call the court's attention to the errors in the charge of which they desire to make complaint.

For these reasons, one-half of your committee recommend that the rule that is in force in the Federal courts and in the majority of the State courts, and that was in force in this State until the Legislature of 1879 changed it, be again adopted, viz.: "That exceptions to the charge of the court must be made after its delivery and before the retirement of the jury, and that errors in the charge not so excepted to shall be regarded by the appellate courts as waived."

A part of your committee are of the opinion that this rule would operate: (1) To prevent many errors which are the results of mere inadvertence and which would be corrected if counsel felt that they were required to bring such errors to the attention of the court. (2) To obviate that anomaly in our system under which the trial judge, without investigation or consideration, and in the hurry of the trial, is required to perform the miracle of charging the entire law of the case with absolute correctness, upon the ground that otherwise injustice is done to the client whose attorney, with weeks for preparation, must be relieved of pointing out error, upon the theory that he is unable to do so. (3) In connection with other recommendations herein, it would tend to restore to the trial court its proper function, to make it the place for the presentation of matured views and well-considered grounds of recovery or defense, instead of, as now, the mere starting point of the litigation, the real disposition of which is to be had in the appellate court. (4) To compel the attorney in the case to prepare his case for the trial court instead of beginning the work of investigation and preparation upon appeal. (Favoring—Lewis and Brown. Opposing—Burgess and Ogden.)

The other half of the committee is of the opinion that the proper administration of justice would not be facilitated or insured by requiring the charge to be excepted to when given, and oppose this change, urging that the decisions of the Supreme Court upon the question state the unanswerable reason in favor of the rule, viz., that it must be presumed that

every ruling of the trial court is deliberately made; that the questions of law involved are discussed and considered by the trial court to whatever extent the judge may deem necessary in order to form his opinion; that, while it is true that sometimes an error creeps into a charge through inadvertence, all know that in actual practice such errors in the vast majority of cases are called to the attention of the trial judge by the losing party on motion for a new trial; that the proposed change would not be of any particular service, for the reason that if a formal exception to the court's charge was required by law it would always be taken to every paragraph of the charge and would amount to no more than an empty and universally used formality; that, in the hurry and excitement of the concluding moments of a trial, material and damaging errors in the charge of the court are likely to be overlooked by counsel, for the very reason that the court permits the errors to creep into the charge, viz., haste and inadvertence; that it often happens that attorneys engaged in the trial of cases do not know what the charge of the court is going to be until they hear it read to the jury, and that if they should be required to detect all of the errors in a lengthy charge from hearing one reading of it, under the penalty of being deprived of the privilege of criticising it on appeal, the result would in many cases be disastrous and work great injustice to litigants; that observation of the workings of the proposed rule in the United States courts in actions at law do not lead to the conclusion that it tends to a very prompt or satisfactory administration of justice.

V.

It is gratifying to report that the members of your committee all concur in renewing a recommendation made by a special committee of the Association at its meeting in July, 1904, as follows:

"We recommend that a statute be passed requiring all pleadings to be verified, and further requiring that all answers shall either admit or specifically deny the facts set out in plaintiff's petition, or allege that the party has no information therein, and that all facts set out in plaintiff's petition or as to which the defendant does not aver that he has no information thereon, shall be taken as true and no proof shall be required of any fact admitted in the answer. We suggest that the affidavit required should be similar to that required in the equity practice, that is to say, where the facts are within the party's knowledge he shall so swear, and where they are made on information and belief he shall swear that he verily believes them to be true, and where the defendant has no knowledge as to facts set out by plaintiff he shall so swear and request that plaintiff be required to prove same."

The reasons that support this recommendation are: (1) That it will tend to prevent feigned and pretended defenses being set up simply for

purposes of delay. (2) That it will lessen the time, labor and expense of preparing a case for trial when the plaintiff is relieved of proving facts alleged by him which may be difficult and expensive of proof, which the defendant knows to be facts and which he is unable in conscience to deny. It is the experience of every lawyer that frequently he has as much trouble in making proof of facts known to be such to both sides as he has in proving the facts of his case that are denied by his opponent. (3) It will tend to aid the judge in the submission of the issues to the jury, because, when not all the allegations of the petition are denied, as now, he can from the pleadings easily determine what questions are made issuable and more readily determine whether, with respect to these, the proof raises a question of fact.

VI.

A majority of your committee are of the opinion that our statutes relating to private incorporations require amendment in many respects, but that in particular there should be a more rigid requirement of proof that the 10 per cent of the capital stock required by law to be paid by the stockholders has in fact been paid, and by which the diversion of this sum, under the guise of dividends or otherwise, should be prevented.

A majority of your committee further recommend that corporations chartered under the laws of this State, or securing permits to do business therein, be required to publish annually or semi-annually a full statement of their condition, verified and in form somewhat like the statements required under the Federal law of the national banks. It is thought that the amendments suggested would tend (1) to prevent the exploitation of the general public by corporations organized for plunder and having no actual paid-up capital; (2) to prevent the freezing out of the minority stockholders by processes in corporate management, or mismanagement, which have become common; (3) to lessen the use of the corporation as a means of accomplishing the ends of trust and monopoly.

It is believed that the corporation is an artificial entity, existing by act of the State and subject to its visitatorial power; that it has in it possibility of abuse not present in the mere co-operation of individuals in partnership; that the honestly conducted and law-abiding corporation will be strengthened rather than injured by the proposed regulations, and that these reasons are sufficient for their adoption. (Favoring—Lewis, Brown, Burgess. Opposing—Ogden.)

The reasons for the opposing view are ably expressed by Judge Chas. W. Ogden of the committee:

"I have never been able to perceive the wisdom or benefit of the provisions of our statutes relating to private corporations which require proof

to be made that 10 per cent of the capital stock has been paid in. The general view I entertain upon this subject is that, with the exception of corporations which have to do with public utilities, our statutes relating to the organization of private corporations should be broadened, instead of restricted. It is certain that the State should exercise such supervision over all corporations created under its authority as will prevent an abuse of the franchises granted. I look upon it, however, that the creation of an ordinary private corporation is, for all practical purposes, nothing more than an agreement, under the sanction of the law, by the individuals interested, to enter into a partnership wherein the extent of their liability is limited. The fact that the liability of stockholders is limited is well known to the general public, and credit is extended to the corporation accordingly. The public, therefore, in my judgment, requires no statutory provision protecting it against improvidence in extending credit to private corporations. An individual who becomes a stockholder in such a corporation, does so with his eyes open, unless he is induced to become such by fraudulent representations, and in such a case, he has ample remedy as the law now stands. I have never been able to appreciate the wisdom or necessity of making it more difficult for an individual to become a stockholder in an ordinary private corporation than it is for him to become a member in a copartnership. I believe that needless restrictions in such matters will result in retarding the development of the State. There are many individuals who will risk a certain amount of capital in the effort to develop a new enterprise who would not incur unlimited liability. For the reasons thus briefly and crudely stated I believe that any legislation looking in the direction of the suggestions made by you on this subject would do more harm than good. I am likewise opposed to Judge Brown's suggestion that every private corporation should make annual reports. I see no more reason for legislation of this character than there would be for extending the statute to copartnerships and individuals. It would certainly discourage the formation of corporations if the stockholders knew that all of their business affairs had to be made public property every year. I believe that it is both wise and proper that corporations handling public utilities should be required to make known to the public everything pertaining to their business which in any way affects the public. I believe that the State should have the power to scrutinize the affairs and operations of all private corporations to whatever extent may be necessary to prevent the abuse of the corporate franchises. I do not, however, believe that any good, but, on the contrary, much harm will result from requiring every private corporation to make, annually, common property of its business affairs."

VII.

At the last meeting of the Association the paper of Mr. W. J. Moroney on "How to Reform Our Civil Court Procedure" was referred to your committee for recommendation. Your committee reports its high appreciation of this paper, but is of the opinion that the Supreme Court now has all the authority in respect to making rules that can be granted with safe regard to the fundamental distinction between the judicial and the legislative branch of the government.

Article 5, Section 25, provides: "The Supreme Court shall have power to make and establish rules of procedure, not inconsistent with the laws of the State, for the government of said court and the other courts of this State, to expedite the dispatch of business therein." Whether this power has been exercised as freely as it might have been done with profit is a question not submitted to your committee. It will be perceived that if the Legislature simply repeals practice provisions that it deems objectionable it need not go further and frame affirmative provisions, but its refraining from doing this vests full power in the Supreme Court.

Respectfully submitted,

YANCEY LEWIS, Chairman.

MR. MILLER, of Travis: I move that we take the report up by recommendations.

The motion was duly seconded and carried.

MR. SANER: We have additional names to present to the Association.

THE PRESIDENT: If there is no objection, we will suspend consideration of the subject before us long enough to act on the applications.

The report of the Directors on the applications for membership, which was thereupon read, was as follows:

Hon. H. M. Garwood, President Texas Bar Association.

DEAR SIR: The Board of Directors beg leave to report that the following persons have applied for admission to membership in this Association, and the Board of Directors having duly considered the applications and found the applicants qualified for membership, hereby respectfully recommend that they be elected to membership in the Association.

Those recommended are as follows: J. T. Robison, Daingerfield; J. M. Henderson, Daingerfield; J. M. Terrell, Daingerfield; J. H. Benefield, Jef-

erson; I. J. Jones, Marshall; T. B. Stinchcomb, Longview; Scott W. Key, Waco; T. S. Barwise, Fort Worth.

Respectfully submitted,

R. E. L. SANER, Chairman;
WM. H. BURGESS,
W. L. ESTES,
E. F. HARRIS,

Directors.

On motion, the report was received and the Secretary directed to cast the unanimous ballot of the Association for the election of the persons named.

The Association then resumed consideration of the report of the committee.

MR. LEWIS: I wish to state that Judge Brown, of the Supreme Court, Judge Ogden, of San Antonio, and W. H. Burgess do not all agree to all the recommendations, their dissent upon various points being indicated, and W. J. McKie, of Corsicana, did not participate in the report.

Mr. Lewis here stated the first recommendation.

THE PRESIDENT: You have heard the recommendation of the committee, gentlemen, what is your pleasure with reference thereto?

MR. MILLER, of Travis: I move that the recommendation of the committee be adopted.

MR. TODD: I second the motion.

THE PRESIDENT: It has been moved and seconded that the recommendation of the committee be adopted, is there any discussion?

THE PRESIDENT: There being none, those in favor of the motion will say "aye."

Motion carried and recommendation adopted.

MR. LEWIS: I will now read the second recommendation.
(Recommendation read.)

A MEMBER: I move that the recommendation be adopted.

A MEMBER: I second the motion.

THE PRESIDENT: Is there any discussion?

MR. HARRIS, of Galveston: I believe that that is dangerous. Suppose you conclude the trial a day or two before the adjournment of court, and you don't have time to file an amended motion for a new trial, and you will have great difficulty in getting up your bills of exceptions. A man is not in position to meet such difficulties when a trial has been concluded near the end of the term. Of course, we know what is the practice under the rule of the Supreme Court.

MR. LEWIS: I think it might not be inappropriate to say that the Constitution confers the entire authority upon the Supreme Court in reference to adopting rules of practice. I think that they are inclined, however, to submit the result of their observations to the Bar Association before they formulate them. This suggestion was made by Judge Brown, as appearing, within his experience, as a fruitful source of unnecessary reversals; in other words, it tends to require parties to go into the trial court for the purpose of disposing of cases upon certain questions and points of law that are raised by the facts, instead of going in with an idea of getting something in, to affect the trial court, that you have not brought to their attention and that they have not ruled upon. This recommendation is with a view to compelling parties to go into court with matured theories of their cause of action and their grounds of defense, and present these to the trial court; and if he rules adversely to these contentions, he has ruled adversely to them; but, as the practice now stands, if he rules unfavorably on a matter that they have not even thought about and did not bring to his attention on the trial or call to his attention in a motion for a new trial, they may secure a reversal upon a matter which never was ruled adversely to them.

MR. TODD: I have in mind a particular case in which I happened to be interested. We were trying a case before a jury and the verdict was rendered after a fair and impartial trial, and the case involved in the neighborhood of ten thousand dollars, and was

appealed and reversed upon a proposition that had never been raised in the trial court one way or another; it had never been even suggested in any way. There was no objection to the ruling on the trial or in the motion for a new trial; and I know that, as the reversal was adverse to me, it made a convert of me. I am heartily in favor of the resolution. I don't think it is just, but that it is absolutely vicious to reverse a case upon rulings upon points that were never raised in the case, and I heartily second the motion to adopt the resolution. When a man goes into his case he should know enough about it to present it properly to the court and jury.

THE PRESIDENT: If there is no further discussion I will put the question. Those in favor of the adoption of the second recommendation of the committee will signify it by saying "aye," opposed, "no."

Motion carried, and recommendation No. 2 adopted.

MR. LEWIS: (The gentleman here read the third recommendation.)

MR. BURGESS, of El Paso: I favor the minority report as to that section offered by the committee. I think it is all right in theory—it is a very good theory—but I don't think it works in fact. My observation has been, and it has been the experience and observation of every lawyer I have ever talked to on that subject, that it is very hard to get over any sort of expression that the court makes as to what the court thinks the facts are. Now, to say at the end of a trial and at the end of a charge in which a jury has been charged on the weight of the evidence, advertently or inadvertently, that this thing is not going to influence me and that I will go ahead and do as I am supposed to do under the rule of law which makes me the exclusive judge of the credibility of the witness and the facts proven, is simply not going to correct the injury. You put the poison in and you can't take it out. I remember on one occasion, a number of years ago, a case was on trial in the Federal Court in El Paso, and a Federal judge of that district graced the court with his presence—he is not the judge that

is there now. The question was this: It was a damage suit against the United States Marshal upon his bond and against his bondsmen. The United States Marshal had arrested a candidate at an election, for doing his duty, and took him to jail and kept him until after the election; and as he didn't have any interest in that office after the election, he sued the Marshal. The Deputy Marshal told the facts on the stand about as I have stated. The trial judge stopped him and says: "You say you arrested a man and a citizen and put him in jail?" "Yes, sir." "Without a warrant?" "Yes, sir." "Because he was discharging his duty as he saw it?" "I don't know about that." "But you arrested him?" "Yes, sir." He turned around to the jury and says: "Gentlemen of the jury, in my earlier days I used to think that a hotel clerk had the appearance of more authority and the least semblance of authority of anyone, but my experience of eighteen years has proven to me that it is a Deputy Marshal." He told the jury they were not to rely upon what he said. The verdict was fifty-two hundred dollars, and he set it aside on account of there being no facts to support it. I can't believe that it is a safe proposition to say to a trial judge that you may put into your charge just as much comment on the evidence as you can inadvertently, and then try to correct it by saying that the jury are the judges of that, and what I have said about it doesn't go. As a matter of law it don't go, but as a matter of fact it will go. I do not believe it is safe. The experience of other countries and our people have been the same, for it is possible for the court to influence the jury by his expressions, whether he does it adverbently or inadvertently. The only way to correct the evil is to make it reversible error and start over again. I can't quite agree with the idea that seems prevalent in every court; that is, that the main object is to prevent reversals. The main object is to follow the law and do justice, and that the appellate court, when that has not been done, reverse the case and send it back for a new trial, is not as much to be regretted as doing an injustice in the cause or doing that which the law does not sanction. Now, I have the very highest regard for the judicial authority and the highest

regard for the judges in this State, both State and Federal, and this has been my experience in practice before. I have many friends among them, and I like them personally; but I don't think that such practice should prevail.

MR. CARTER, of San Antonio: I wish to say that I have respect for the opinion of the majority of the committee, but that Mr. Burges is right. I have no patience with a halfway measure. It is to be assumed that theory is based largely upon facts. There has not been any intimation that the judges could be approached; but the judge, in charging upon the weight of the evidence, can commit a grievous injury. I think that the jury should pass upon the evidence. I don't think that the court should be allowed, advertently or inadvertently, to charge upon the weight of the evidence.

MR. PENDARVIS: I think this resolution is a proper step. I think Mr. Carter's view about the province of the jury is incorrect, and I think he will so decide if he will study English history. Now, the juries in England have always been of what we call bailiwicks. The English jurors are very intelligent and they can perform the duties that are left to them, and I do not believe that the American jurors are any less capable of performing their duties. In the Federal courts in our country they have adopted the English system. I think that the American jurors are able to follow the instructions of the court. I don't think that a case should be reversed on a technicality. Where justice has been done, there should be no reversal; and it is the experience of the lawyers that there are entirely too many reversals.

MR. STREETMAN: I believe that it would be dangerous to say that the judge should be at perfect liberty to charge as he pleased upon the facts and evidence, and I doubt whether that danger would be eliminated by several clauses in the charge that they were the exclusive judges, and that they were not to be influenced by the expressions of the judge, and that they were the sole judges of the facts proven and the credibility of the witnesses. And I believe

when the judge has charged upon the weight of the evidence the verdict should be set aside.

MR. WILKINSON: I don't wish to be deprived of my privilege as a member by being Secretary. I believe that the judge should be entitled, as in the Federal and English courts, to sum up the evidence and assist the jury in arriving at a determination of the facts. Questions of fact and of law are frequently so mingled that, under our present rigid rules, it is difficult for the judge to give the jury the information they need as to the law without commenting on the facts. It would help to accomplish justice in the trial of cases if they could give the jury that assistance upon those matters in question which they are not now permitted to give in charges to the jury; and I believe if the judge was permitted to do that, it would be the greatest step toward the accomplishment of justice that we have taken, and would make our district courts more responsible for the correct adjudication of cases. I don't know whether there is another member who takes the same view. To judge from the general tone of remarks on this question, one would think that the bar regarded the unenlightened indiscretion of jurors as the palladium of our liberties. I may be a crank on this subject, but I want to offer this substitute for the third recommendation of the committee:

That so much of Article 1317, Revised Statutes, as forbids a judge, in jury trials, to charge or comment on the weight of evidence should be repealed.

The substitute was seconded by a member.

THE PRESIDENT: You have heard the resolution offered by the gentleman from Travis offered in lieu of the third recommendation of the committee.

Motion seconded.

A MEMBER: I move to table the substitute.

The motion to table the substitute was adopted.

The motion to adopt the third recommendation was defeated.

MR. LEWIS: I will read the fourth recommendation of the committee. (It is read.)

MR. BURGESS: On that recommendation there is a division, Mr. Brown and Mr. Lewis favored the resolution, and Mr. Ogden, of San Antonio, and myself opposed it. I am compelled to differ with my associates. The objection to it, as it seems to me, is this: If the exceptions are to be taken before the jury retires and after the charge has been given, my objection is this, that there is no law requiring the judge to let you see the charge, and I have seen several instances where it was impossible, and more frequently impossible under the circumstances surrounding the closing hours of the court, when the judge wants to get his charge prepared and don't want to keep the jury waiting. I do not believe that justice could be obtained under any such conditions. I do not believe that you should be forced, after hearing the charge read one time, to point out to the court substantially your objections to that charge by bill of exception taken at that time, and, failing to do that, that the litigant has no right to complain of an error in the charge. The court has all the time he can get to prepare the charge, and the jury has all the time they want to take to examine it and see that they understand it, and the counsel ought not to be forced to understand it at the first reading, regardless of how complicated it might be, and by not seeing the errors in the charge and taking exception to it to lose his right to except. I do not believe that counsel should be placed in that situation. I do not believe that that burden should be placed upon the litigant because the counsel could not catch the errors by hearing it read one time. If we had a practice like some States, where the charge is read and ample time given for the preparation of special charges, it would be all right.

MR. TODD: I second this motion because there will be a report of the committee of which I am a member that will make a recommendation, which, if adopted by this Association and enacted into a law of this State, would render this objection entirely immaterial; that is to say, it will do away with any question on this

proposition. That proposition is, that upon the conclusion of the facts in any case the court's charge is prepared in connection with the action of the counsel on each side and this charge then delivered to the jury, and that the charge will actually be delivered to the jury before there is any argument on the facts before them. Under this theory the law of the case would be settled before the case is argued to the jury, because the law in the case would be argued and the proper exceptions taken to the charges given or refused. The proposition is that every lawyer ought to know what the theories of the charge are, and whether the court refuses to give his view in a charge to the jury; and if he thought the law as given was contrary to his view he would interpose and reserve his exception. If the charge of the court was understood by the counsel before they went to the jury for the determination of the facts, then, of course, there would be no trouble about interposing exceptions to the charge. I believe that the law of the case should be thoroughly determined by the court, and by the counsel on both sides, before the discussion of the facts to the jury; and an observation from twenty-five years of practice before the courts here and in Arkansas, and the majority of the States of the Union, convinces me that a case could be much better tried and justice could be reached and mistrials avoided. Errors in the charge that don't go to the merits of the case and to the question of whether the deliberate judgment of the court was right or wrong would be eliminated. All the interests of litigants could be better conserved if the law of the case was settled before the submission of the case to the jury upon the facts. When a lawyer goes to the jury with the law in his hand as declared by the court and says, "Gentlemen, here is the law and you must apply the facts to this law," there is little room for a mistrial and little room left for a misconstruction of a question of law. Also, a lawyer can't go to the jury and differ with the law announced by the court in his argument to the jury. This matter was presented to the Legislature fifteen years ago, and one man voting against it, in giving his reason against it, stated that he could never win a case if that

were the practice. With permission of the President, I will read the report of our committee now so that the discussion of the present recommendations may be considered in connection with it. It is as follows:

TEXARKANA, July 12, 1906.

To Hon. H. M. Garwood, President of the Texas Bar Association:

The undersigned, a member of your Committee on Judicial Administration and Remedial Procedure, in the absence of the Chairman and other members of the committee, begs leave to state that a majority of the committee have not been able to meet, and no regular report has been prepared or agreed upon, though there has been some correspondence between the Chairman and members, in which the following suggestions have been made and considered, which I take the liberty to submit:

1. The last Legislature passed a law regulating the taking of depositions in civil cases, which, among other provisions, permits the taking of depositions *de bene esse* by oral examination, but only upon written agreement of the parties to the suit filed in the cause. This practically denies the right to take depositions in such manner, as both parties will seldom agree. It is submitted that the requirement of such an agreement ought to be stricken out of the law and that either party, upon giving proper notice to the adverse party, should have the right to take depositions by oral examination, cross-examination and re-examination, before a competent and a disinterested officer at a designated time and place, as is the practice in the Federal courts and in many State courts.

2. The undersigned respectfully submits that Articles 1300 and 1316 of the Revised Statutes (1 Sayles' Civil Statutes) should be so changed as to provide that the charge of the court should be delivered to the jury *before* instead of *after* the argument of counsel to the jury upon the facts.

Respectfully submitted,

CHAS. S. TODD,
Of Committee.

MR. MILLER: I move to amend the section under consideration by adding that reasonable time be given to counsel in the case to consider the charge.

THE PRESIDENT: Does the committee accept it?

MR. LEWIS: I do. I accept for myself.

MR. RODGERS, of Bowie: As I understand this question, it is before the house in this manner: There is a recommendation by

a majority and a minority. Now what I want to do is to lay this whole matter on the table until we see what is done with the report of the committee that Mr. Todd has suggested will be presented to this Association.

MR. ALLEN: I would like to offer a substitute for the motion to table, and that is to add to the recommendation of the committee which we are now considering, "Provided the charge of the court is read to the jury before the argument is commenced."

MR. LEWIS: I accept that.

THE PRESIDENT: You have heard the motion of the gentleman from Kaufman offering a substitute to the motion offered by the gentleman from Travis, by providing that the charge of the court be submitted to the jury before the argument is begun.

A MEMBER: I second the motion.

MR. DABNEY: I am heartily in favor of the motion by the gentleman of Kaufman, with an addition which I do not wish to put in the form of a motion, but I trust that he will accept it, and that is, "provided that, before the charge is read to the jury, it shall be submitted to counsel on both sides," so that they can make their exceptions and tender them to the court in order that the court may have the benefit of these exceptions and reconstruct his charge and get it right if possible.

ATTORNEY GENERAL DAVIDSON: Gentlemen of the Association, I don't think I can add a word to what has been said and said so well. I want to state that I have had some experience, probably not as much as some of you or any of you, in the Federal courts in the trial of cases; and one of the greatest problems that I have had to deal with is what to do with the charge of the court before the jury retires, as to whether to except to it and to know what to except to. It has been my actual experience with juries in the Federal court, in cases where I took exceptions to the charge, that thereafter I found that all my exceptions related to immaterial matter and I never took an exception to a material matter. Now you take my

experience, as an ordinary common lawyer, and you will find that to be the experience of most of you in this State. I like better our State practice, that gives the ordinary lawyer an opportunity, in his hour of privacy when all nature is asleep, with the charge of the court before him, so that he can do the best for his client. Now, gentlemen, I want to say this upon this proposition, as well as upon others, it does not make any difference what kind of resolution you adopt here, or which one you adopt; it is perfectly harmless unless you follow it up at Austin. It might be the wisest resolution and the wisest policy and the wisest practice, but it is perfectly harmless and useless unless something is done at Austin. I have had the pleasure and the honor, and somewhat of labor, of being around and in Austin, in the Senate and as your Attorney General, for the last several years. I want to say to this Association, and to make this suggestion, that, whatever we do, let's follow it up at Austin; and if you follow your resolution to Austin and be present in the lobby as a citizen of Texas and as members of the great profession of the law working for the improvement of the law, you will find what that influence can do and what you can accomplish as the Bar Association of Texas. Let me impress that upon you, and let me say to you now that you gentlemen may be here day in and day out, and pass resolutions recommending to the Legislature, but nothing will be accomplished unless you follow it to Austin with your presence, and with your counsel, and with your influence, and see that your request is put into legislation. I say to you, gentlemen, as a member of your Association since 1882, watching its progress and its work with interest, if we want to get anything adopted into legislation we will have to go with it to Austin.

MR. LEWIS: I have to apologize for trespassing upon your time. I am perfectly aware that lawyers are the most widely different set of men on earth, and we know as a committee that if you passed the recommendation not to reverse on error that did not effect the substantial rights of parties,—if you took that pill,—that was sufficient and we will withdraw the rest of our recommendations.

A MEMBER: I move that we vote on the original question.

Upon vote, the fourth recommendation was defeated.

MR. LEWIS: I move that the balance of the report be not presented, as we have as much as we can stand.

The motion was carried, and thereupon the Association adjourned till 2 p. m., July the 12th.

THIRD DAY.—AFTERNOON SESSION.

The Association was called to order at 2:30 o'clock July the 12th, 1906, by the President.

THE PRESIDENT: The report of the Committee on Legal Education and Admission to the Bar is in order.

THE SECRETARY: I received a letter from Judge Simkins stating that he had not been able to get together the information and the statistics from the various examining boards that he needed to make his report, and asked me that the same be passed.

On motion, the report was deferred.

MR. KELLER: I have a report that the Chairman of the Committee on Commercial Law has sent in to me. There has been no meeting on the subject by the committee, and I haven't signed the report because I can't agree to all of it. I am not in favor of repealing the bankrupt law at the present time.

The report, which was thereupon read by Mr. Keller, was as follows:

To Hon. H. M. Garwood, President of the Texas Bar Association:

Your Committee on Commercial Law beg leave to report as follows:

The Constitution of this Association provides that the President shall annually appoint a Committee on Commercial Law, and Section 4, Article 6 of the By-Laws, provides that it shall be the duty of such committee to report the best means to produce uniformity in commercial law and usages. Except as above the duties of this committee are not indicated. It may be that the committee has performed its whole duty when it has considered and reported as to the best method of producing uniformity in

commercial law and usages, but in the past the committee has usually felt at liberty to deal with any subject fairly falling under the head of commercial law.

As a consequence, its reports, now parts of the records of this Association, have not only covered the question of the best means of producing uniformity, but practically the whole field of commercial law, and have from time to time pointed out supposed defects and imperfections existing in the commercial laws of this State and suggested remedies for such defects and imperfections. These reports seem to have had no influence either in promoting the cause of uniformity or in bringing about the improvements suggested. This doubtless is due largely, if not entirely, to the fact that the profession has not felt the great inconvenience usually attributed to diversity in the laws, and has not found the defects pointed out in existing laws nearly so serious in actual operation as they have been pictured in theory.

The truth is the laws of the several States do not present the substantial differences usually attributed to them. There are, of course, many minor differences—largely differences of form—and there always will be so long as we believe in and maintain a government of sovereign and independent States. But our laws, with a few exceptions, have a common origin; and so long as they are interpreted by judges, and control the affairs of men having the same ambitions and aspirations and the same ideals, they will be developed along essentially the same lines, and there will be no substantial differences between them that are not based on substantial differences of fact and surroundings, which could not be overcome simply for the sake of making the law uniform with that of some other State or locality where the same conditions did not exist.

There are, however, certain rules of law, purely or largely conventional, where it does not matter greatly what the rule is, so it be fixed and certain. In this field uniformity is most desirable. To determine what these rules are and the best method of bringing about uniformity between them, it is essential to provide some method of co-operation among the several States. It is believed no better method can be devised than that suggested and followed by the American Bar Association. In a report made by the Committee on Commercial Law of this Association in 1898, in speaking of the work of the American Bar Association along these lines, it was said:

"The early stages of the work performed by the American Bar Association in this field consisted principally of pointing out, through the reports of committees and papers and addresses read before the Association, the extent of this diversity and its practical effects—a work educational rather than remedial. It was not until 1889 that any definite action was taken looking to the application of a remedy. In that year the Association appointed a committee of one from each State to promote the cause of

uniformity of law, and in the following year recommended the passage of a statute by each State for the appointment of commissioners to examine certain specified subjects and to meet in convention and draft uniform laws to be submitted for approval and adoption to the several States. This plan has secured most flattering results, so far as co-operation is concerned, and without which the end sought is impossible of attainment, until at the present time thirty States and one Territory have appointed commissioners.

"The commissioners so appointed meet in annual conference at the place of meeting of the American Bar Association and usually a few days before the Association. Usually these commissioners are three from each State, appointed for five years, with authority to confer with like commissioners from other States and recommend forms of bills or measures on those subjects where uniformity seems desirable and attainable. The commissioners usually serve without compensation, but in most cases are allowed their reasonable expenses by the State. These commissioners from the several States and Territories form what is called the "Conference of Commissioners on Uniform State Laws." For the better accomplishment of the work with which they are charged, these commissioners have formed themselves into a National body with a president, vice-president, secretary and assistant secretary, annually elected.

"Absolute uniformity in laws throughout the Union under our system of governments is practically impossible, and perhaps in many particulars not especially desirable; but substantial uniformity in those laws which affect directly the citizens of more than one State, and in many cases the citizens of many or all, which is especially the case with commercial laws, is much to be desired and not inherently difficult of attainment. It is along these lines that the American Bar Association and the Conference of Commissioners have directed their labors. They have not attempted to formulate codes which shall make uniform the great body of the laws of one State with those of the others, but have selected those subjects on which uniformity is most needed—those which are most general in their application throughout the country—and have labored to secure harmony on those particular subjects.

"Your committee believe that the plan of the American Bar Association above outlined is the best means that can be suggested to promote uniformity, not only in commercial law and usages, but in such other laws as it may be found desirable to make uniform. They, therefore, recommend that this Association appoint a committee whose duty it shall be to draft and present to and endeavor to have passed by the Legislature of this State an act authorizing the appointment of Commissioners on Uniform State Laws, with powers and authority similar to those conferred on its commissioners by the States hereinbefore mentioned."

We approve the above recommendation of the committee of 1898, and here adopt it as our own. We believe it the best means of securing all that may be desirable and attainable in legal uniformity.

Your committee's attention has not been called to any glaring defects or imperfections in the existing commercial laws of this State, and none have occurred to them. The commercial laws of Texas are not perfect, but it is believed that they compare favorably with those of our sister States where the conditions are similar. That some of such laws are susceptible of improvement is certainly true, but that their shortcomings have not been found serious, and that they have on the whole proved reasonably adequate for all demands upon them, is illustrated by the fact that the pointing out of supposed defects has worked no cure of such defects. When these laws do in fact become inadequate and seriously defective and no longer serve the purposes for which they are intended, then, and not till then, will the suggestions of this Association as to their inadequacy and amendment bear fruit.

There is one subject, however, we believe worthy of the consideration of this Association, and that is whether the National Bankrupt Act should be longer continued. The present bankrupt act has been in force practically eight years. Its main purposes are, in common with all previous bankrupt laws of the United States, the freeing of the insolvent debtor from liabilities which he could not otherwise discharge and the equal distribution of his assets among his creditors. The justice and wisdom of, from time to time, setting the hopeless insolvent free is patent, and this, involving as it does the cancellation and repudiation of the debtor's contract, can only be done by an act of Congress. It would seem, however, that eight years have afforded ample opportunity to those suffering from the burden of their debts to secure their freedom, and as this is the main purpose of the bankrupt act, it would seem to have about reached the limit of its proper existence.

It has been the policy of this country to make its bankrupt laws temporary and to abolish them when the purposes of their enactment have been accomplished. This policy has thus far seemed wise and has worked well, and there is no apparent reason why it should now be departed from. The repeal of every bankrupt law in force in the United States has been hailed with as much satisfaction as its enactment. The welfare of society does not demand that a haven be always open to welcome the reckless, extravagant or dishonest, and shield them from the just and inevitable consequences of their own folly or misconduct, and the easy entrance into such a haven without cost, save a small pilot fee, does not exert a wholesome influence in the business community.

Of course, justice and decency require a fair and honest distribution of the insolvent's property among his creditors, and prohibit unjust and im-

proper preferences; but improper preferences are not evils that become necessary upon the abolition of a bankrupt law. This part of the subject is fully within the power of the several States. The disadvantages and inconveniences, to say nothing of the poor results generally obtained in an administration under the existing bankrupt law, are familiar to every lawyer who has come in contact with them. Many matters of everyday occurrence are under this law involved in obscurity and difficulty, and it requires a better lawyer to foreclose a mortgage on the farm of a bankrupt, so as to leave behind no possible shadow upon the title, than it does to foreclose a mortgage on a railroad with all of its attendant receivers and masters in chancery.

The necessity of, from time to time, discharging insolvent debtors is a full justification of the enactment by Congress of periodical bankrupt laws, but such laws must of necessity, so long as they are in force, deal with matters usually beyond the powers of Congress, except as part of a bankrupt enactment. The existing bankrupt law is an attempt on the part of Congress to give to the country a bankrupt law and at the same time preserve to the several States all of the powers at all consistent with the operation of such law. As long as the several States are more or less jealous of their rights, our bankrupt laws will be framed on somewhat the same principles. This can not fail to inject into them complications and difficulties which can not and do not arise except under our system of a dual government.

A bankrupt administration, under the existing law, proceeds upon a very different theory from that of a probate court administering the estate of a decedent. The probate court administers the entire estate for the benefit of all concerned, whereas the bankrupt court administers solely for the benefit of unsecured creditors and that part of the estate in which there is supposed to be some excess that may inure to the benefit of these unsecured creditors. All this involves difficulty and complication, and it is oftentimes difficult to tell whether you are in or out of the bankrupt court.

These are a few of the reasons that can be urged for the abolition of the present bankrupt law.

It is proper to say that the members of this committee have not had an opportunity of consultation on the matter of this report, and all of them do not know its contents. Consequently none of them are responsible for it save those who sign it.

All of which is respectfully submitted.

HENRY C. COKE,
Of Committee.

A MEMBER: I am opposed in toto to the repeal of the National Bankrupt Act. I don't believe a single solitary act can be pointed

out where an injustice has been done. By the enactment of that law it has improved the credit of the merchants of this country. It has completely eliminated and destroyed that class of creditors who are universally present in class "A" under the old law. I think it is a wise and magnificent law. It helps and protects the honest merchant; and it helps the honest man when he is overtaken with misfortune; and I move that the recommendation be not adopted.

On the recommendation for repeal of the Bankruptcy Law being put to a vote, the Association declined to approve it.

The Board of Directors reported the examination of the books of the Secretary and Treasurer and found them to be correct and asked that they be approved, which was done.

MR. COOK: I move that the Governor be requested to name suitable representatives among such gentlemen as he may be able to get to go who will attend the present session of the Congress on Uniform Laws, at St. Paul, about August the 24th.

MR. M. L. CRAWFORD: Has the Governor any such power? And if he makes the appointment, does he not do it as the agent of this Association?

MR. COOK: The Governor could just name them and give them their credentials.

MR. CRAWFORD: I think the President of this Association is just as competent to make it, and I don't think that this Association has to go anywhere to get anybody to name their delegates.

A motion by Mr. Crawford to substitute the President of the Association for the Governor was carried and the motion then adopted.

THE PRESIDENT: Is there a report from the Committee on Amendments to the Civil Procedure?

THE SECRETARY: I have a letter from Mr. Rhodes S. Baker, the Chairman of the special committee appointed to report on

that subject, stating that he will be absent from the State and will not be able to make a report.

THE PRESIDENT: Are any members of that committee present?

Judge Streetman, of the committee, submitted a report, as follows:

To Hon. H. M. Garwood, President of the Texas Bar Association:

At the last meeting of this Association, upon the motion of Mr. Rhodes S. Baker, of Dallas, a special committee was appointed of which Mr. Baker was Chairman, for the purpose of reporting to this Association its views upon a reformation of our Code of Civil Procedure. None of that committee, except the writer, are present at this meeting, and no report has been submitted from the other members of that committee. I was not present during the discussion which led to the appointment of this committee, and I had expected to obtain from the other members of the committee a more accurate idea of what they were expected to accomplish. It had been my purpose to submit for their consideration some suggestions with reference to some matters embraced within the apparent scope of the motion under which the committee was appointed, and, if my associates concurred with me in my views, to present them for the consideration of the meeting.

I had, however, expected that the general work and report of the committee would be formulated upon consultation with the other members, so that the report as a whole should embrace a somewhat comprehensive view of the needed reforms in civil procedure.

In the absence of the rest of the committee, this purpose has not been accomplished; but in order that the committee may not be wholly in default, I have decided to submit to the Association some suggestions which I had intended to present to the committee. Under the circumstances, it is proper that I should state that the other members of the committee have not been consulted upon the subject, and I do not undertake to commit them to views expressed.

I submit, therefore, rather as my individual views than as a committee report the following suggestions:

To ascertain the principles of law in the abstract is not a matter of supreme difficulty. At present, as in the days of Dickens, "The difficulty of the law lies in the application of it." This application must needs be accomplished by the judicial machinery of the State, and through whatever method of procedure may be prescribed for its government. The judicial system of our State may not be entirely perfect. No human institution can be expected to be free from all objection, but it is mainly

prescribed by organic law, and any substantial changes must be effected by amendment to the Constitution; and any other system, however attractive it might seem in prospect, would, in its practical results, unquestionably present difficulties perhaps even more serious than those which are the occasion of complaint against the present arrangement. The rules of substantive law (that part of the *lex scripta* and *non scripta* which undertakes to define the rights of person and of property) do not, in every case, accomplish substantial and exact justice, but through the evolution of the law in the courts and the statutory enactments of the legislative department we have a body of substantive law—not perfect, indeed, but which, as a whole, if properly administered and modified from time to time to meet the needs of an advancing civilization, will secure to every citizen his just and equitable deserts and prevent and redress any encroachment upon his rights of person and of property.

It, therefore, practically results that perhaps the most important concern of those who are interested in seeing substantial justice administered should not be to effect important changes in the body of our substantive law, nor yet in the judicial machinery through which it is administered, but to see that the procedure by which the courts are governed is so regulated that these principles will be, in fact and not merely in form, applied to the various controversies presented to the courts for adjustment.

A moment's reflection recalls the historical fact that those momentous reforms which, in the Roman Empire, by gradual degrees transformed the old *Jus Civile*, with its *five actions* (*Legis Actiones*) for the enforcement of all civil rights, into the comprehensive and equitable "Roman Law" as embodied in the Pandects and Institutes of Justinian, was, in the main, a reformation in the procedure of the courts, and, in the light of modern experience and widespread criticism of our courts, on account of reversals for unsubstantial errors, it is interesting to note that Gaius, in writing of the reasons which induced a modification of the Roman system, said: "But all these actions of the law gradually fell into great discredit, because the oversubtlety of the ancient jurists made the slightest error fatal." So in England, much of the difficulty encountered by Mansfield and others by whom the system of equitable jurisprudence was established, arose out of the blind conservatism that Coke and Hale and Blackstone and other adherents of the common law exhibited in their adherence to the technical forms which had become crystallized into inviolable rules, and by which, or not at all, suitors must obtain relief.

No objection quite so serious as those which prevailed against the ancient systems can be urged against our present systems of procedure, but there arises from the layman and from the public press a frequent complaint against the miscarriage of justice, brought about by the reversal of cases for reasons which do not address themselves to the average man of

ordinary intelligence as of controlling importance. These complaints are more frequently indulged against decisions in criminal cases, because of these the public is more generally informed and in them a more general interest is involved. But if the public had a like interest in all the civil cases decided by our courts and these were likewise subjected to the glare of public criticism, it is not unlikely that the complaint would be as frequent and as loud against the decisions of our civil courts as against the criminal department.

It has doubtless been the experience of many members of this Association, as it has been of the writer, that after a trial of a case before a jury, in which the issues were fairly submitted by the trial court and a verdict reached which did substantial justice between the parties, an appeal has been taken, an assignment of errors filed complaining separately of each paragraph of the court's charge and of the refusal of seventeen special charges asked by the defeated party, and when the case has reached the Court of Civil Appeals you were confronted with the condition that in some paragraph of the court's charge, to which neither you nor the adverse party nor the jury had given the slightest attention in the trial, or perhaps until the preparation of the briefs in the case, there was an incorrect statement of a legal proposition, or an unintentional assumption of some fact by the trial judge, and the Court of Civil Appeals must, in obedience to precedent, if not to law, reverse the judgment and burden the parties and the public with the delay, expense and inconvenience of another trial, when everybody connected with the case knew, as an actual and practical fact, that the error for which the case was reversed had no effect whatever upon the result of the trial.

And yet as a lawyer, you recognize that the decision is correct. It accords with precedent. The trial court has violated some rule of law. The appellate court could not do otherwise. You are so thoroughly convinced of it that you would not hazard even a motion for rehearing. And yet, when your client, a man of good intelligence and business judgment, calls upon you to know why his case was reversed, you can not, to save your life, make to him an explanation that will not convince him, and that ought not to convince you, that there is a radical defect in the procedure which requires the reversal of a case for an error which had no practical effect upon the trial.

And upon the other hand, what one of you has not experienced or observed a trial where, by reason of popular prejudice, or powerful advocacy, or some fortuitous circumstance, a verdict has been rendered which you know, and which even the winning party knows, but perhaps will not admit, is against the evidence and an utter miscarriage of justice. And this case is appealed; and when the record is examined, the appellate court discovers that no sacred precedent has been violated, and, although

it is compelled to say that if it had been the jury it might have (and as a fact it knows it would have) reached a different conclusion upon the evidence, yet it is unable to say that the verdict is so excessive or so manifestly against the overwhelming weight and preponderance of the evidence as to show the effect of passion, prejudice or an improper motive on the part of the jury, and so the judicial robbery is affirmed, and the learned opinion in the case becomes a precedent and stepping-stone to even greater miscarriages of justice.

Again, it not infrequently occurs that cases which in justice ought to be reversed upon the facts are reversed because of some unimportant error of law, and you have doubtless heard the suspicion indulged that the appellate courts sometimes strain themselves to find an error of law, in order to reverse a judgment not in accordance with justice, but which, within the limits of the rules they have announced, they are powerless to disturb upon the facts.

If this condition exists, does it not behoove the members of the bar to investigate the causes and propose some remedy for these troubles? As a remedy for reversals for errors in law it has been proposed that the charge of the court should be prepared and submitted to counsel before the argument, and that no objection not then made shall afterwards be considered. Such a change in procedure might accomplish much to remedy this trouble, and if a further requirement were made that no complaint on account of errors in law could be made on appeal unless raised in a motion for new trial, whether the trial was before the court or the jury, it would doubtless result that many reversals on appeal would be avoided; but it is to be doubted whether either or both of these requirements would afford complete relief, because, even with these safeguards, objections could be hid away and made in such manner as not to specifically attract the attention of the trial court, and yet, upon appeal, it could not be denied that they were presented as required; and, after all, the trial court would be often compelled to grant new trials for errors that were really unsubstantial, in order to prevent a reversal, and the only relief afforded would be the saving of an appeal.

It has seemed to me that the difficulty lies deeper than this, and that the remedy must be a little more radical.

Two rules have been adopted by our appellate courts in the decision of appeals in order to determine whether a case shall be reversed—one with reference to errors of law, the other with reference to questions of fact.

With reference to questions of law, the rule is, generally speaking, that if an error is shown by the record, it will be presumed to have been harmful, unless the appellate court can demonstrate to the contrary. To this there are apparently some exceptions, in such matters as the control of argument, and other features of the trial in which a measure of discretion

is invested in the trial court, and in which an error will not be cause for reversal unless the appellate court can affirmatively say that it probably resulted in injury to the complaining party.

But, generally speaking, where there is an error in the admission or exclusion of testimony, or in the charge given by the court, or in refusing requested instructions, there is a presumption, which the appellate courts are not at liberty to disregard, that such error affected the result of the case, and in order to overthrow this presumption the appellee has the burden of demonstrating from the record, almost to a mathematical certainty, that the error was harmless. And I may observe in passing that this presumption is contrary to the fact in perhaps 75 per cent of the cases reversed for errors of this character.

From this rule it has resulted, not occasionally, but frequently, that cases are reversed because of the use of "or" for "and" or for some inadvertent expression, which is held to invade the province of the jury and amount to an assumption of some fact in issue, or because of some incorrect definition of a technical expression, or the failure of the court to correctly distinguish between finespun issues, simply because it can not be said by the appellate court that the error did not result in injury to the complaining party. And yet, in almost every such case, the attorneys in the case and the trial court know as a practical fact that the verdict of the jury would have been the same in spite of the error, and that perhaps no member of the jury, and no one else except a trained legal mind, could appreciate the difference between the charge given and that which should have been given.

Is it not to be feared that our courts, in this respect, may be subjected to the criticism, as were the lawyers on one occasion, of taking tithes of mint, cummin and anise and neglecting the weightier matters of the law—righteousness and judgment?

With reference to questions of fact, the rule has been adopted which is expressed as follows: "Appellate courts are only authorized to disturb the findings of a jury upon a question of fact when there is no evidence to support such finding, or when the verdict is so manifestly against the great weight and preponderance of the evidence as to lead to the conclusion that the jury were influenced by an improper motive." *Railway Co. vs. Lee*, 74 S. W. Rep., 375; *Railway Co. vs. Rowell*, 45 S. W. Rep., 763; *Railway Co. vs. Holland*, 66 S. W. Rep., 68.

The result of this rule has been that appellate courts have been powerless to reverse many cases where the verdict was clearly against the preponderance of the evidence, and where an examination of the record would convince any reasonable man that, in all probability, an injustice had been done.

In not a few of such cases the courts have felt called upon to justify

themselves by a reference to this iron-clad rule, and to say that if they had been in place of the jury they would probably have reached a different conclusion.

And thus it has resulted, as every practicing lawyer knows, that while there is an abstract distinction between cases in which there is no evidence to support a verdict and those in which the evidence preponderates against the verdict so manifestly as to show an improper motive on the part of the jury, the distinction has no practical significance, and we can practically say that if there is any evidence whatever to support a verdict it will be affirmed.

I do not desire to be classed as an iconoclast in calling attention to these hoary-headed principles and suggesting that they are the patent cause of much miscarriage of justice, but, for the consideration and discussion of the members of the bar, they suggest that if these are in fact the causes of the troubles we have enumerated, it would be well to strike at the root of the evil. The practical remedy which I suggest would be to radically change, by legislative enactment, the rules to which I have referred.

The presumption which obtains that every error of law is harmful unless the contrary can be demonstrated from the record should be reversed. The presumption should be that the error was harmless unless it appears to the appellate court, from a reasonable consideration of the whole record, that it probably affected the result of the trial.

The rule which requires the appellate courts to affirm unless the evidence discloses an improper motive on the part of the jury should be abolished, and the Courts of Civil Appeals should be required to carefully examine the evidence in the record and if, upon such examination, the judgment does not meet with their approval, they should be required to reverse the case and remand it for another trial.

It is unnecessary to say that these suggestions are somewhat radical, and they would prove far-reaching in their consequences. They would transform our Courts of Civil Appeals from mere machines into real live judges, seeking to ascertain and adjudicate the real merits of causes. They would do much to prevent reversals for unsubstantial errors of law, and to secure redress from frequent outrageous verdicts upon the facts. They would answer, in a large degree, the popular and not wholly unjustified complaint against the bench and bar, that cases are adjudicated upon technicalities and not upon their merits; and they would, to some extent at least, give effect to the intention of our people and Legislature when they created the Court of Civil Appeals as an appellate court with jurisdiction over facts.

Since the foregoing portion of this report was written, based upon deduction from personal experience and observation, my attention has been

called to a recent address delivered by Judge Amidon, of North Dakota, to the Bar Association of Minnesota, in which he refers to the American doctrine which presumes that every error of law was harmful, and says:

"The cardinal point of difference between legal administration here and in England is in a doctrine which constitutes the fatal defect in our system—the doctrine that where error is found prejudice will be presumed. Since the Judicature Acts (1873) the law in England has been that a new trial shall not be granted on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, unless, in the opinion of the court to which the application is made, some substantial wrong or a miscarriage of justice has been thereby occasioned on the trial."

Under the operation of this rule, it is said that while in the United States 46 per cent of appealed cases are reversed, in England new trials are granted in only 3½ per cent, and as a resultant benefit, litigants are not worn out by protracted and expensive litigation, and courts and lawyers, instead of having their attention largely devoted to an effort, on the one hand, to inject an error into the record and, on the other hand, to secure a judgment that will be affirmed, are free to devote their entire energies to the main object of ascertaining the real merits of the controversy and rendering substantial justice between the parties.

I believe that these subjects are worthy of the best thought of our Bar and our legislators, and that when they have received the consideration to which they are entitled, Texas, which has been a pioneer in more than one field of legal reform, will require of its courts that they cease to strain out gnats while they swallow camels; that they be released from these rusty shackles which now bind them, and be allowed to devote their energies and intelligence to the real purpose of their existence—the attainment of justice between man and man.

Respectfully submitted,

SAM STREETMAN,
Of Committee.

On motion, the report of Judge Streetman was passed for further consideration and for a report from the full committee.

THE PRESIDENT: The Committee on Grievances and Discipline?

The Committee on Grievances and Discipline stated that they had no report to offer.

THE PRESIDENT: We will hear the report of the Committee on Criminal Law.

JUDGE BOONE: I will read the report:

Mr. President and Gentlemen of the Bar Association:

As the only member of this committee present in attendance on this Association, it has fallen to my lot to prepare and submit the report. I had expected the Chairman of the committee, the Hon. W. C. Wear, to make this report, and in consequence I had not given any consideration to the matter before my arrival here, but rather than see default made in the report, and at the request of the President of the Association, I submit the following suggestions, crude though they may be, for the consideration of the Association. Some of these it is earnestly recommended that the Association adopt, others are simply submitted to be considered by the Association for whatever they may be worth:

First. It is respectfully submitted and recommended that the first resolution of the Committee on Jurisprudence and Law Reform adopted by the Association at Wednesday's session, with reference to harmless error, be applied also to the practice in our criminal appeals, and that in all cases where it appears from the record that substantial justice has been done the appellant in the court below, the case be affirmed by the Court of Criminal Appeals regardless of any slight technical errors committed by the trial court. The adoption of this recommendations is earnestly urged.

Second. *Continuances.*—It is earnestly recommended that this Association adopt resolutions looking to the amendment of the Code of Criminal Procedure as to first applications for continuances, either on the part of the State or on the part of the defendant; and that in making the first application, the party applying therefor be required, where the application is on account of the absence of witnesses, to state under oath, as in subsequent applications, that the testimony of the absent witnesses or witness can not be procured from any other sources known to such party.

Third. That the degrees of murder be abolished, and that the offense of manslaughter be abolished, and that the offenses of murder in the first degree, murder in the second degree and manslaughter be included in and comprehended under the general offense of murder, and that the definition of murder as it stands in the Penal Code be amended so as to read substantially as follows: "Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State with malice aforethought, either express or implied, shall be guilty of murder"; and that the penalty now provided by law for murder in the first degree, second degree and manslaughter be retained as the penalty for murder, making the punishment for murder to be by death, by confinement in the State penitentiary for life or for any number of years not less than two; and that from the evidence before it, the jury determine the punishment for the particular offense as in their discretion they may consider com-

mensurate with the crime committed, and that the statutory constituents of the offense of manslaughter be permitted to be introduced in evidence by the defendant and be required to be considered by the jury in mitigation of the penalty to be found by them.

Fourth. That in all murder cases, where the evidence discloses that murder was committed with any of the weapons commonly known as concealed weapons, by proper legislation, the burden of proof be imposed upon the defendant to show that the homicide was justifiable.

Fifth. *Bail*.—It is earnestly recommended that proper steps be taken to secure legislation to permit the defendant after conviction, when the punishment assessed is less than capital or life imprisonment, to be released on bail, when an appeal has been taken, pending such appeal, and that the amount thereof be fixed by the trial court.

Sixth. That the whipping-post be established for wife-beating and vagrancy.

Seventh. That the law with reference to court stenographers and with reference to the proceedings of the grand jury be so amended as to permit the stenographer, under proper provisions, to take the testimony of witnesses before the grand jury when request therefor is made by the district or county attorney.

Eighth. *Charge of the Court*.—That the charge of the court, instead of, as now, being required to give in full statutory definitions of offenses, be deemed sufficient if the offense is substantially defined.

Ninth. That the charge of the court be submitted to the jury before argument of counsel.

In submitting this report as a member of the committee, I desire to state that some of the matters included were suggested to the Hon. F. J. Duff, of Beaumont, one of the members of the committee, by the Hon. W. H. Pope, Judge of the Fifty-eighth Judicial District, embodied in a letter from Judge Pope to Mr. Duff written at Mr. Duff's request, which letter was delivered to me to be considered in making the report, with the suggestion that some of the matters recommended by Judge Pope were endorsed by Mr. Duff, while others were not. Those endorsed by Mr. Duff and which are included in the report are with reference to bail after conviction and with reference to the charge of the court being required only to give substantial statutory definitions and that such charge be submitted before argument. The suggestion with regard to the whipping-post for wife-beating is one of the suggestions made to Mr. Duff by Judge Pope and which is herein submitted, but in which suggestion Mr. Duff does not concur.

The other suggestions and recommendations are made on my own volition and without consultation with the other members of the committee, as none of them are here and as I have not communicated with any of

them with reference to the report for the reason stated in the beginning of this report. These suggestions so made by me are made for whatever they may be worth. Some of them, if adopted and enacted into law, in my humble opinion, formed from observation and from the short experience that I have had as a trial judge, I believe would greatly simplify our criminal law in the particular respects to which the suggestions refer and would greatly facilitate the trial of criminal cases. Some of them I hope will be approved by the Association, others are merely suggestions.

Respectfully submitted,

GORDON BOONE,
Of Committee.

A motion was adopted that the recommendations of the report be separately considered.

The first and second recommendations were adopted.

MR. CRAWFORD: I offer as a substitute to recommendation No. 3 that the distinction between murder in the first degree and murder in the second degree be abolished. There has never been any necessity for that except in the case of the death penalty. As long as there is any alternative punishment in practice, there is no necessity for a distinction between murder in the first and murder in the second degree. Now, I undertake to say that no jury in this country, and I have great respect for the juries, has ever undertaken to figure out whether the malice was express or implied. They have limited it to the enormity of the offense and have determined from that or from the degree of malice whether murder in the first or second degree. Now, if they will just strike that out and make all the phases of murder with the alternative punishment from the highest penalty to five years in the penitentiary, that will answer every purpose in the world. So far as abolishing the offense of manslaughter is concerned, that ought not to be done. If a man has his wife insulted or his daughter, and if the man hunts him up and kills him, he ought not to have to face trial for murder. I don't believe in repealing the offense of manslaughter. Men might be friends for thirty years and something should come up in a moment when one should strike the other down and still he would have to face a jury and run the chance of going to the

gallows for that, and can it be possible that the people of this State are willing to repeal that statute?

MR. MILLER: I don't think that we are in a position to make such radical changes in our criminal laws of this State and we ought to take more time to study it. I would not vote for it without taking time to study it. I move that the committee recommendation and the substitute offered be laid on the table.

THE PRESIDENT: It is moved and seconded as a substitute both for the recommendation of the committee and for the amendment offered by the gentleman from Dallas, that the entire recommendation with the amendment be laid upon the table. And the motion to lay upon the table is not subject to debate.

MR. ALLEN, of Kaufman: I rise to a point of order. It is out of order to table a recommendation made by a regular committee of this Association.

THE PRESIDENT: I think that the motion comes purely under the common law of this Association, and I will put the motion to lay upon the table.

The motion to table was carried.

The fifth recommendation of the committee was read.

MR. HART, of Bowie: I hope the Association will vote that amendment. I understand that recommendation is to entitle a man to bail after he is convicted for an offense less than capital or life imprisonment. We have got this hardship all over the State. An unfortunate client of mine, without anybody to represent him, is lying up here in jail convicted and given two years for manslaughter, and I can make bond in two minutes, but the law won't permit me. It is nothing but right and justice that the court should fix a bond.

The fifth recommendation of the committee was, on motion, adopted.

Recommendation No. 6 being read.

ATTORNEY GENERAL DAVIDSON: I have been studying Brother Boone and his recommendation, but I am like Brother Crawford; there are some considerations that ought to be allowed for the weakness of human nature. Now, he don't set out in his recommendation for wife-beating that there might be mitigating circumstances. There is no statement there as to what brought it on, and no statement there as to who got the worst of it.

The sixth recommendation, on motion to adopt, the Association refused to agree to.

THE PRESIDENT: The discussion of the report of the committee seems likely to be somewhat protracted, and there is another committee whose report should not be omitted. If I hear no objection, I will request that further consideration of the matter before us be postponed till we can hear from the Committee on Deceased Members.

The Secretary read the report of the committee, as follows:

To Hon. H. M. Garwood, President of the Texas Bar Association:

Since last this Association met, four of its members, each eminent in his profession and strongly entrenched in the confidence of his brethren and of the public, have been removed from among us.

WM. L. PRATHER.

William Lambdin Prather, who held the position of President of this Association for the term of 1895-6, was suddenly stricken and died July 24, 1905. He was born May 1, 1848, in the State of Tennessee, and was brought to Texas by his parents at an early age. In the year 1867 he entered Washington and Lee University at Lexington, Virginia, and for three years pursued the academic course, and then took the two-year law course in the fourth year. He was a student at the time of the death of General Lee, and was selected by the family as one of the pallbearers, and aided in bearing to the tomb the hallowed clay of the South's beloved and illustrious son.

From 1871 to 1899 he practiced law in the city of Waco, and stood in the front rank of the bar of that city. He was appointed a Regent of the University of Texas in 1887, and held that position until 1899, when he was chosen President of that institution. He was admirably fitted for the position, by reason of his previous service as regent, and his liberal learning and executive ability. He consecrated himself with earnest de-

votion to the duties of his office, and under his administration the attendance of students was largely increased, and the University became more firmly grounded in public confidence, and won to a greater extent than ever before the favor of the Legislature.

As lawyer, citizen and public officer, William L. Prather lived always on lofty levels, and worthily bore at all times the "grand old name of gentleman." His life and his service, especially in the position which death found him, were of inestimable value to his State and his fellow-men, and his death brought sorrow to thousands of hearts, and thereby society suffered a loss which has been and will continue to be sorely felt.

Able lawyer, accomplished gentleman, worthy citizen; may his rest be peace.

C. C. GARRETT.

The death of few men in Texas has called forth such deep and widespread sorrow as did that of Hon. C. C. Garrett, ex-Chief Justice of the Court of Civil Appeals, First Supreme Judicial District of Texas, which occurred September 15, 1905, and never was man more worthy of the tribute of esteem which such sorrow indicated.

Judge Garrett was a native Texan, having been born in Washington county, February 3, 1846, and his love of his State was most intense, and he was proud to render her service. He began his collegiate course at Soule University at Chappell Hill, Texas, and completed it after the close of the war between the States, at Washington and Lee University, where he received a first honor medal as the most distinguished member of the class of which he graduated. Shortly after his return from college he began the practice of law at Brenham, as a partner of that now distinguished lawyer and eminent judge, Hon. Seth Shepard, now Chief Justice of the Court of Appeals of the District of Columbia, who is himself a native of Washington county. After the dissolution of that partnership by the removal of Judge Shepard to Galveston, Judge Garrett was elected Judge of the Twenty-First Judicial District of Texas, and in 1890 was appointed a member of the Commission of Appeals. In 1892 he was elected Chief Justice of the Court of Civil Appeals of the First Supreme Judicial District of Texas, comprising fifty-seven counties, a position which he held until a short time prior to his death, when he resigned, owing to his physical disability.

He was always an earnest student and an indefatigable worker. His achievements at college and at the bar and on the bench were the fruits of honest toil. He was never distinguished as a public speaker. He had none of the gifts or graces of an orator, but he was essentially a scholar and a thinker and writer.

If, as has been said, genius be the capacity for hard work, he was a genius. He performed thoroughly every task, he did every duty which lay

in his path, and as a judge executed justice and maintained truth with clean hands. He was genial and gentle, and his thoughts, his speech, and his actions were pure, and as a gentleman and a judge, he was above reproach. It is right to say this, because it is true. It is just to the dead, and it will be pleasing to the living who loved him, and whose name is legion. All men trusted him, for his integrity of thought and deed. It was a part of the man, the product of heredity and training. He was instinctively and essentially clean and honest; had he not been, he would never have reached the position of Appellate Judge in Texas.

During the more than sixty years that Texas has been a State, there has never been a charge or intimation of corruption, or even of impropriety of conduct against any judge of her appellate courts. The commission to the high position of judge of an appellate court in Texas is a certificate of unimpeachable honor and incorruptible integrity, and Judge Garrett ably maintained that high standard.

It is creditable to humanity that men are always willing to speak well, or at least not to speak ill, of the dead. Over the bier of him who has passed away they are ready to cast the pall of forgetfulness; but it has not been necessary in the smallest degree to invoke or apply this sentiment of charity with reference to Judge Garrett. There was no act of his which needed to be concealed or which demanded explanation or apology. He was manifestly and transparently honest, unsophisticated and sincere. The chronicler who is called upon to tell the story of his life finds it as near blameless and spotless as ever frail human life is. As a citizen, husband, father, lawyer and judge, he went in and out before his fellowmen with undefiled garments, and with clean hands and a pure heart.

If it be true, as the poet hath said—as manifestly it is—that “no life can be pure in its purpose and strong in its strife, and all life not be purer and better thereby,” then the life of Judge Garrett must have been a benediction unto his fellowmen, for he obeyed the precepts of Him who was at once an exemplar and an atonement, and whom he was not ashamed to confess before men.

By the death of Judge Garrett, the bar and bench of Texas sustained a grievous loss; but a large measure of consolation is gathered from the fact that he left behind him the memory of a life nobly lived, and duty ably and faithfully performed in every sphere of life “in which it pleased God to place him.”

WILLIAM SION ROBSON.

The subject of this sketch, Judge W. S. Robson, was a native of Georgia. He was born in Madison county, February 4, 1851. His parents were Dr. John R. Robson and Ann Keith Robson. In April, 1854, his father moved to Texas and settled in Fayette county, at Round Top, which at that time was a center of wealth and intelligence. In 1860 his mother died, and in

1863 he moved with his father and family to La Grange, the county seat of Fayette county. In 1867, during the scourge of yellow fever that swept through Texas, his father was stricken down and died, and the son, after a lingering illness, survived. Left an orphan at the age of 16, he began the battle of life. He was educated in the public schools at Round Top and La Grange. Owing to the fact that the war had swept away the wealth of his parents, and also having lost his parents, when quite young, he was deprived of the advantages of a collegiate or academic training. It is sometimes said that what are disadvantages for one, are advantages for another, and it may have been that the early deprivations with which the subject of this sketch was beset were blessings in disguise. Responsibility is a great educator, and it only gravitates and settles upon the shoulders of those who are capable of bearing it. At the early age of 16 he became the breadwinner and head of an orphan family. He was not afraid of work, and he began his first labors as that of a butcher. Being possessed of a bright, active and receptive mind, he was destined soon to aspire to higher, better and more congenial labors. In 1872, at the age of 21 years, he was elected to the office of hide and animal inspector, which position he filled creditably until 1874. During these years he was engaged in the laudable task of self-education. From 1874 to 1876 he served with credit and distinction as Deputy District Clerk of Fayette county. After the adoption of the Constitution of 1876, in February, 1877, he was elected Assessor of Taxes for Fayette county, and was re-elected to this office in 1878. The records of this office now bear some of his footprints in the shape of improvements and innovations proposed and carried out by him. Before his term of office as Assessor of Taxes had expired, and while he was fulfilling the duties of his office, he at the same time was reading law for the purpose of obtaining license and offering his services as a practitioner. At the June term of the district court of Fayette county in 1880, he was one of four candidates who applied for admission and who were admitted to practice law. The other three were Temple Houston, now deceased; Paul Meerscheidt, of San Antonio, and A. J. Rosenthal, of Galveston. Immediately upon his admission to the bar, Judge Robson took an advanced position, and from that time to his death he was connected, on one side or the other, with almost all of the important litigation, civil and criminal, arising before the courts of Fayette county, and he was often called beyond the limits of his county to attend to the litigation of a large and devoted clientele. During the years of 1884 and 1886 he took considerable interest in political affairs. In 1885 he was elected messenger to carry the Presidential vote of Texas to Washington City. In 1890 he was elected county judge of Fayette county, over a strong opponent and with a flattering majority. He held this office for six years, without any practical opposition, and at the expiration of

this time he voluntarily retired to the walks of private life and to enjoy a private practice.

Judge Robson was prominently connected with the Ancient Order of United Workmen, one of the strongest benevolent organizations in the United States. It numbers a membership of nearly a half million, which is scattered over the United States and the Province of Canada. In 1898 he was elected Supreme Master Workman of this order, which office he filled with credit to himself and satisfaction to his friends. In 1898 he was unanimously nominated as the Democratic candidate for Congress in the then Tenth Congressional District. In this contest, he was defeated by a small majority. But he made a magnificent canvass and a splendid race. His defeat was due largely to the position of his party at that time towards the money question, which largely unsettled party lines and party fealty. Judge Robson was married to Miss Lucy Praetorius of La Grange in 1876. There were born to them eight children, all of whom are living—four boys and four girls. M. R., G. C., R. B. and W. S., Jr., are the sons, and Agnes K., Lucia May, Sidonia and Juanita Ray, are the daughters.

On October 7, 1905, after suffering from a stroke of apoplexy and paralysis, Judge Robson passed away, surrounded by his family, at La Grange, Texas, age 54 years, 8 months and 3 days. Up until a short time before his death, Judge Robson took an active interest in all public affairs, State and county, and was active in the encouragement of local industries and home improvements. He was a public-spirited man, generous to a fault, and possessed of a kind heart and noble disposition. His friends were devoted to him, and his family worshipped him. He was one of the charter members of the Texas Bar Association. He was one of the committee that was appointed to assist in drafting the original By-Laws of this Association.

Much time could be consumed in recounting his achievements, but limited time and space forbids.

He entered the practice of law in partnership with A. J. Rosenthal in 1880. This partnership continued until Judge Robson was elected county judge of Fayette county. In June, 1897, he was a member of the partnership of Robson & Duncan. This partnership continued until the 1st of June, 1903. After that time, he practiced law alone.

May his ashes rest in peace.

HON. B. R. WEBB.

The friends and fellow citizens of Hon. B. R. Webb were grievously shocked when on the morning of June 28th it was announced that he was dead. Outside of the circle of his family and nearest friends, few knew that he was a sufferer from a form of illness that sapped his strength and so weakened his mental powers that at times he was not responsible for

his actions. He bore his suffering with great fortitude, and continued his labors as legal author and official reporter of the appellate courts until his mental faculties gave way under the strain, and in a moment of delirium, born of agony, and hopelessness, he ended his own life.

Like many others of the legal profession, Judge Webb became so absorbed in his literary and official labors that he failed to realize that there was a limit of toil beyond which neither mind nor body can safely go, and he fell a victim of the stress and strain of overwork. He was a man of culture and refinement, a deeply learned lawyer and a reporter of rare skill. He was a faithful member of this Association and rarely failed to be present at its annual meetings. In the volumes which contain the record of its proceedings will be found papers read by him which contain not only most instructive discussions of legal questions, but much rare humor, and evidence of liberal culture.

We miss today his genial presence and wise counsel, and realize with painful force that this Association and the State has lost an able lawyer, cultured gentleman and faithful public servant.

Judge Webb was born July 2, 1852, in Pontotoc county, Mississippi. His father was Britton R. Webb, who was State Secretary under the administration of Governor McLane. In 1871 he entered the University in Oxford, Mississippi, for a course of two years. In 1873 he was admitted to the bar in Liberty, Mississippi. He removed to Texas in 1877, and settled in Breckenridge, Stephens county, where he married Miss Lillie Callaway, the daughter of an Alabama planter. In 1880 Judge Webb and his wife removed to Baird, Callahan county, and in 1895 they came to Fort Worth. Judge Webb was immediately appointed as Reporter for the Court of Civil Appeals of the Second Supreme Judicial District of Texas, in which position he had served with entire satisfaction up to the time of his death.

In connection with his brother, Mr. Webb published a treatise on the Criminal Law of Texas, which, though the first work of young men, was well received by the profession, though long since superseded by later and more elaborate works on the subject. In 1890 he published a more ambitious venture in law-book making and one intended for general not merely local use. This was his volume on Record of Title. It was an able and scholarly work, the result of careful study and has been widely circulated and commended. It remains a standard text-book on the subject. He had contemplated a revision of this work and an extension of it, to cover the entire subject of Notice, and had spent much labor upon it, but was forced by failing health, about a year ago, to abandon the design after much material had been collected.

Mr. Webb had been an occasional contributor, to law periodicals, of carefully prepared monographs and had often appeared before the Bar Association of Texas. The humor with which he so often entwined its

discussions was so popular there that it was perhaps by way of protest against the role of entertainer that his last appearance, which was at its last annual meeting, was as the author of an essay upon an abstruse and technical legal question, that of "C. O. D. Sales of Intoxicating Liquors," in which the authorities were closely examined and the matters acutely reasoned.

On motion, the report of the committee was adopted.

A MEMBER: I would like to ask, Mr. Chairman, if Ex-Governor Hogg was a member of this Association.

THE SECRETARY: Governor Hogg joined the Association at Galveston, but never attended any more, and never paid any more dues, and his name was dropped from the roll.

MR. MILLER: I move that the Secretary send a copy of the resolutions to the respective families of the deceased members.

The motion was carried.

THE PRESIDENT: I believe we interfered with the report of the gentleman from Beaumont. We will now proceed with the report.

Recommendation No. 7 of the report of the Committee on Criminal Law being read and its adoption moved, was agreed to.

Recommendation No. 8 of the committee was then read.

MR. CRAWFORD: It does occur to me that the recommendation is a radical change in our criminal law, and I do not think that it ought to be adopted.

The eighth recommendation, on being put to vote, was lost.

The tenth recommendation of the committee was adopted.

THE SECRETARY: The Committee on Publication begs leave to submit the following report:

To the Texas Bar Association:

Your Committee on Publication respectfully report that they have procured the publication of the Proceedings of the annual meeting of 1905 by the printing establishment of Von Boeckmann-Jones Co., of Austin, who made what was considered the best bid of several houses who were asked to submit terms for the work, and that the same have been distributed to

the members of the Association and to the usual exchanges. It was found necessary on account of the increased membership to issue an edition of 600 copies, and a slight increase may be found advisable for the next report.

The copies distributed to members were not bound, your committee proceeding on the assumption that those who desired to permanently preserve the Proceedings would find it convenient to bind several numbers in one volume. But our Proceedings have for several years been of length to make a volume of several hundred pages per year, and they would suggest that the Association or the next Publication Committee, if no directions are given by the Association, consider the advisability of binding all the copies in cloth. For several years the committee has pursued this plan with about 100 copies, for use in exchanging with other associations or for public libraries. The cost this year was 20 cents additional; but all the Proceedings could be neatly bound in cloth for a cost probably not exceeding 15 cents per volume.

Your committee would also suggest the advisability of reporting the Proceedings of the present joint session and the separate sessions of the Arkansas and Texas Associations in a single volume, for the use of both Associations, or that the Publication Committee be left free to pursue that course if agreeable to the Arkansas Association or its committee having the matter in charge.

Respectfully submitted,

A. E. WILKINSON,
JNO. C. TOWNES,
W. M. KEY,
R. H. CONNERLY,
W. P. ALLEN.

The report was received and approved.

THE PRESIDENT: The life I have lived is among lawyers. It is almost all my life; and to have received this token of your confidence and your estimate of me is an honor greater than could be conferred by any power in the State. I feel that I have not been able to discharge the duties of this high position with that degree of credit that has been done by my distinguished predecessors, but this I can say, that I have attempted to do everything I could do to make a success out of the Association, such as I feel that our meeting has been. Most of this is due to the courtesy and assistance of your Board of Directors and Secretary. We have tried to present the Association with a program for this annual session that will

be enjoyed by everyone, and we will now proceed with the next order of business, which is the nomination of your President.

MR. BURGES, of El Paso: Gentlemen of the Association: I have heard so much talk, that I am satisfied the Association don't want any more talking even on a good subject and therefore I will make a brief speech. I want to place in nomination Mr. A. L. Beaty, of Sherman, for President for the ensuing year. Those of us who had the pleasure of seeing him last night in a dress suit know that he will fill the bill physically. And those who have met him in the courtroom know that he will fill it mentally, and those that have worked with him in the harness of this Association, as I have had the pleasure of doing in times past, know that he will fill it with real service to this Association, and we hope the vote will be unanimous.

A MEMBER: I ask that the vote be a rising vote, authorizing the Secretary to cast the ballot of the Association.

MR. GARWOOD: Gentlemen, it is my honor and pleasure to introduce to you Mr. Beaty, who has been elected as President of your Association by a unanimous vote, and I appoint Mr. Burges to conduct him to the chair.

MR. BEATY: Gentlemen of the Association: I am not going to make any speech. You have been too kind to me, and you are too tired. I want to say, however, that I do appreciate this honor that you have conferred upon me. But I feel, however, a little like the old woman when her husband joined the church: she said, "He is not fittin'," and that is my only regret.

The next order of business is the election of other officers and I will call for nominations for Vice-President.

MR. LEWIS: Mr. President and Gentlemen of the Association: Having regard for the unwritten law of the Association which has become operative, that we nominate for Vice-President to succeed the President on the ensuing year, it gives me pleasure to present the name of a gentleman who has long served this Association, who is noted for his hard work and close application to the duties at-

tendant upon his office, and it seems to me that the Association honors itself more than it does him to elect him as Vice-President of the Association, Judge Wilkinson, of Austin.

THE PRESIDENT: There being no other nomination, I will put the motion. I ask that the chairman of the Board of Directors be instructed to cast the vote of this Association for Mr. Wilkinson for Vice-President.

MR. SANER: With pleasure, I cast a unanimous vote for Judge Wilkinson for Vice-President.

MR. WILKINSON: Gentlemen of the Association: I can only say that I feel very deeply the honor which you have done me and I appreciate doubly the honor because it means a release by promotion from a very arduous position which I have been trying very hard to fill for the last four years. I thank you very much, gentlemen, for the honor which you have done me.

MR. PHILLIPS: I doubt whether—and it can well be doubted—we can find a gentleman to fill the duties of Secretary better than the gentleman that we have just released. I beg to present to the Association for this position a gentleman whose ability especially renders him, in my judgment, fit for that position; a young man who bears a splendid and distinguished name; one that is honored and revered by every lawyer throughout this land, and one I think bears it with honor; a young man I believe that will fill it with credit; I present to you the name of L. Q. C. Lamar, of Dallas.

Mr. Lamar was elected by acclamation, the retiring Secretary being instructed to cast the ballot.

MR. LAMAR: Mr. Chairman and Gentlemen of the Bar Association: I can hardly find words at this time to express my appreciation of the honor that has been conferred upon me by the Bar Association. I have only been a member for one year. I am guilty of the grievous crime, as you can observe, of being a young man, but since the Bar Association has seen fit to elect me to fill Judge Wilkinson's place, I assure you it will be a labor of love to

do everything in my power to fill the position, and tendering the best of my efforts to this Association so long as I may be able to serve it. Gentlemen, I thank you.

W. D. Williams was elected Treasurer, the Secretary casting the ballot by unanimous vote.

MR. ALLEN: I move that the present Board of Directors be elected for the ensuing year.

The motion was carried.

Mr. Cook, of Beaumont, nominated Beaumont as the next place of meeting, and, on motion, Beaumont was selected as the next meeting place.

The President named the following delegates to the National Bar Association: Messrs. F. Charles Hume, Jr., C. Keller and Yancey Lewis. Alternates: Mr. McLendon, Mr. Dyer, Mr. Gregory and W. L. Davis, of Beaumont.

A MEMBER: I move that a vote of thanks of this Association be tendered the Texarkana bar of Texas and Arkansas, and to the newspapers, and more especially to the magnificent ladies of Texarkana, also the telegraph and telephone companies and street car companies.

The motion was adopted.

On motion the Association adjourned.

TEXAS BAR ASSOCIATION.

OFFICERS AND COMMITTEES.

1906-1907.

A. L. BEATY.....	President	Sherman.
A. E. WILKINSON.....	Vice-President.....	Austin.
L. Q. C. LAMAR.....	Secretary	Dallas.
W. D. WILLIAMS.....	Treasurer	Fort Worth.

BOARD OF DIRECTORS.

R. E. L. Saner, Chairman.....	Dallas.
Edw. F. Harris.....	Galveston.
Wm. H. Burges.....	El Paso.
D. E. Simmons.....	Austin.
W. L. Estes.....	Texarkana.

Committee on Jurisprudence and Law Reform.

George Thompson, Chairman.....	Fort Worth.
J. L. Young.....	Cooper.
Edgar Watkins	Houston.
J. L. Dyer.....	El Paso.
W. M. Crook.....	Beaumont.

Committee on Judicial Administration and Remedial Procedure.

A. P. Dohoney, Chairman.....	Paris.
I. M. Standifer.....	Houston.
Rhodes S. Baker	Dallas.
Lewis T. Carpenter.....	Dallas.
J. M. Duncan.....	La Grange.

Committee on Legal Education and Admission to the Bar.

C. H. Miller, Chairman.....	Austin.
T. S. Henderson.....	Cameron.
C. C. Potter.....	Gainesville.
C. C. McRae.....	Houston.
W. M. Peck.....	Denison.

Committee on Commercial Law.

F. Charles Hume, Jr., Chairman.....	Houston.
J. I. Wilson	Houston.
W. S. Simkins.....	Austin.
Ocie Speer	Fort Worth.
M. H. Gossett.....	Dallas.

Committee on Publication.

A. E. Wilkinson, Chairman.....	Austin.
C. H. Miller.....	Austin.
T. W. Gregory.....	Austin.
B. D. Tarlton.....	Austin.
R. H. Connerly.....	Austin.

Committee on Deceased Members.

Yancey Lewis, Chairman	Dallas.
J. L. Autry.....	Beaumont.
L. Q. C. Lamar.....	Dallas.
Jno. I. Kleiber.....	Brownsville.

Committee on Transportation.

H. M. Garwood, Chairman.....	Houston.
Hiram Glass	Texarkana.
E. B. Perkins.....	Dallas.

Committee on Grievances and Discipline.

Jno. C. Walker, Chairman.....	Galveston.
H. F. Lively.....	Dallas.
J. O. Terrell.....	San Antonio.
W. H. Allen.....	Terrell.
F. S. Eberhart.....	Gilmer.

Committee on Criminal Law and Criminal Procedure.

C. T. Freeman, Chairman.....	Sherman.
P. A. Turner	Texarkana.
J. M. Pearson.....	McKinney.
T. P. Steger.....	Bonham.
R. D. Hart.....	Texarkana.

ROLL OF MEMBERS WITH RESIDENCE AND DATE OF ENROLLMENT.

Abbott, Jos., Hillsboro.....	July 17, 1882.
Abernathy, W. B., McKinney.....	July 13, 1905.
Abney, Hamp B., Sherman.....	July 12, 1905.
Adams, J., Kaufman.....	July 3, 1902.
Alexander, W. M., Dallas.....	July 29, 1896.
Allen, W. H., Terrell.....	Dec. 14, 1883.
Allen, W. P., Austin.....	July 9, 1903.
Anderson, Wm. W., Houston.....	July 29, 1897.
Andrews, Frank, Houston	July 25, 1900.
Andrews, Jesse, Houston	July 13, 1904.
Armstrong, W. T., Galveston.....	July 25, 1900.
Armistead, Geo. J., Texarkana.....	July 11, 1906.
Armistead, W. T., Jefferson.....	July 11, 1906.
Ashe, Chas. E., Houston.....	July 13, 1904.
Atlee, E. A., Laredo.....	July 24, 1886.
Aubrey, Wm., San Antonio.....	Dec. 25, 1884.
Autrey, Jas. L., Beaumont.....	July 29, 1891.
Avery, J. M., Dallas.....	July 29, 1891.
Bailey, Edw. H., Houston.....	July 13, 1904.
Baker, Jas. A., Jr., Houston.....	July 17, 1882.
Baker, Rhodes S., Dallas.....	July 2, 1902.
Baldwin, J. C., Houston.....	July 28, 1898.
Baldwin, B. J., Paris.....	July 12, 1905.
Ball, Robt. L., San Antonio.....	Dec. 25, 1884.
Ball, T. H., Houston.....	July 25, 1894.
Ballew, W. W., Corsicana.....	July 11, 1906.
Barwise, T. H., Jr., Fort Worth.....	July 11, 1906.
Barbee, Will L., Houston.....	July 13, 1904.
Bartlett, F. W., Dallas.....	July 2, 1902.
Bass, C. L., San Antonio.....	July 8, 1903.
Bates, C. L., San Antonio.....	July 8, 1903.

Bates, Wharton, Houston	July 8, 1903.
Batsell, Chas., Sherman	July 12, 1905.
Beall, T. J., El Paso	July 24, 1886.
Bean, B. F., Groveton	July 26, 1899.
Beaty, A. L., Sherman	July 2, 1902.
Beaty, Jno. T., Jasper	July 13, 1904.
Belden, Sam'l, Jr., San Antonio	July 13, 1903.
Beal, A. J., Karnes City	July 20, 1897.
Bell, C. K., Fort Worth	July 13, 1905.
Benefield, J. H., Jefferson	July 11, 1906.
Berry, W. C., San Antonio	July 8, 1903.
Blake, S. R., Bellville	Dec. 14, 1883.
Bliss, Don A., Sherman	July 12, 1905.
Bondies, Harry R., Dallas	July 13, 1905.
Bookhout, John, Dallas	July 2, 1902.
Boone, Gordon, Navasota	July 13, 1904.
Borden, Henry L., Houston	July 13, 1904.
Botts, Thos. H., Houston	July 13, 1905.
Bradley, C. S., Groesbeck	July 8, 1903.
Bradley, Tom C., Bonham	July 13, 1905.
Brooks, M. M., Dallas	July 13, 1904.
Brooks, S. J., San Antonio	July 31, 1895.
Browder, Ed M., Dallas	July 2, 1902.
Brown, T. J., Sherman	July 17, 1882.
Brown, R. L., Austin	May 5, 1885.
Brown, E. F., Sherman	July 13, 1905.
Bryan, Beauregard, El Paso	July 29, 1896.
Bryan, Lewis R., Houston	July 29, 1891.
Bryan, Chester H., Houston	July 13, 1904.
Burford, A. L., Mt. Pleasant	July 13, 1904.
Burgess, R. F., El Paso	July 29, 1896.
Burges, Wm. H., El Paso	July 8, 1903.
Burney, R. H., Kerrville	July 8, 1903.
Burns, W. T., Houston	July 30, 1896.
Cage, Elliott, Houston	July 13, 1904.

Campbell, T. M., Palestine.....	July 2, 1902.
Campbell, J. W., Houston.....	July 13, 1904.
Campbell, J. R., Sherman.....	July 13, 1905.
Cantey, S. B., Fort Worth.....	July 27, 1898.
Carpenter, Lewis R., Corsicana.....	July 12, 1905.
Carswell, R. E., Decatur.....	July 25, 1894.
Carter, C. L., Houston.....	July 8, 1903.
Carter, H. C., San Antonio.....	July 25, 1894.
Chambers, E. S., Clarksville.....	July 12, 1905.
Chambers, C. M., Clarksville.....	July 11, 1906.
Chesley, A., Bellville.....	Dec. 14, 1883.
Childs, J. D., San Antonio.....	July 27, 1898.
Clark, Jno. H., San Antonio.....	July 29, 1896.
Clark, V. M., Sulphur Springs.....	July 2, 1902.
Clark, Wm. H., Dallas.....	July 24, 1886.
Clough, G. J., Galveston.....	July 11, 1906.
Cobb, Jos. L., Sherman.....	July 13, 1905.
Cochran, T. B., Austin.....	July 25, 1894.
Cockrell, Jos. E., Dallas.....	July 29, 1896.
Coke, Henry C., Dallas.....	July 24, 1886.
Coldwell, W. M., El Paso.....	July 13, 1904.
Coll, Geo. E., Galveston.....	July 31, 1901.
Conally, Tom, Marlin.....	July 2, 1902.
Connerly, R. H., Austin.....	July 29, 1898.
Connor, H. C., Sulphur Springs.....	July 2, 1902.
Connor, E. S., Paris.....	July 12, 1905.
Cox, W. E., San Antonio.....	July 8, 1903.
Craddock, Jno. T., Greenville.....	July 12, 1905.
Crane, M. M., Dallas.....	July 2, 1902.
Crawford, M. L., Dallas.....	July 24, 1886.
Crawford, M. L., Jr., Dallas.....	July 3, 1902.
Crawford, W. L., Dallas.....	July 17, 1882.
Crawford, Walter J., Beaumont.....	July 2, 1902.
Crisp, J. C., Beeville.....	July 27, 1893.
Crook, W. M., Beaumont.....	July 8, 1903.

Culberson, Chas. A., Dallas.....	July 17, 1882.
Cunningham, A. M., San Antonio.....	July 8, 1903.
Dabney, S. B., Houston.....	July 11, 1906.
Dannenbaum, H. J., Houston.....	July 13, 1904.
Davidson, R. V., Austin.....	July 17, 1882.
Davis, A. L., Beaumont.....	July 11, 1906.
Davis, L. B., Cleburne.....	July 24, 1886.
Davis, M. W., San Antonio.....	July 8, 1903.
Dean, A. R., Sherman.....	July 12, 1905.
Decker, N. H. L., Denison.....	July 12, 1905.
Denman, L. G., San Antonio.....	July 25, 1894.
Dillard, F. C., Sherman.....	July 12, 1905.
Dinsmore, J. H., Sulphur Springs.....	July 2, 1902.
Dorough, R. P., Tyler.....	July 11, 1906.
Dodd, Thos. W., Laredo.....	July 24, 1886.
Dohoney, A. P., Paris.....	July 12, 1905.
Drouilhet, P. A., Galveston.....	July 31, 1901.
Duff, F. J., Beaumont.....	July 31, 1896.
Duff, R. C., Beaumont.....	July 31, 1901.
Duncan, Jno. M., Tyler.....	July 29, 1896.
Duncan, J. T., La Grange.....	July 29, 1897.
Dyer, Jno. L., El Paso.....	July 27, 1898.
Eagle, Joe H., Houston.....	July 8, 1903.
Eberhart, F. S., Gilmer.....	July 2, 1902.
Edwards, Peyton F., El Paso.....	July 29, 1896.
Eppstein, L. B., Denison.....	July 9, 1903.
Estes, W. L., Texarkana.....	July 12, 1905.
Evans, H. G., Bonham.....	July 29, 1896.
Evans, W. A., Bonham.....	July 12, 1905.
Ewing, Presley K., Houston.....	July 11, 1899.
Feagin, J. C., Livingston.....	July 13, 1904.
Figures, W. B., Atlanta.....	July 11, 1906.
Finley, N. W., Dallas.....	July 17, 1882.
Finley, J. W., Sherman.....	July 12, 1905.
Fisher, Lewis, Galveston.....	July 8, 1903.
Fisher, Sam R., Austin.....	July 17, 1882.

Flowers, M. O., San Antonio.....	July 9, 1903.
Ford, T. W., Houston.....	July 9, 1882.
Ford, T. C., Houston.....	July 28, 1898.
Foster, Arthur C., Haskell.....	July 26, 1893.
Franklin, Thos. H., San Antonio.....	Dec. 25, 1884.
Freeman, C. J., Sherman.....	July 12, 1905.
Gafford, B. F., Sherman.....	July 12, 1905.
Gaines, R. R., Austin.....	July 28, 1897.
Galloway, C. L., Sherman.....	July 12, 1905.
Garland, J. E., Texarkana.....	July 11, 1906.
Garrett, C. C., Brenham.....	July 17, 1882.
Garrett, W. N., San Antonio.....	July 13, 1904.
Garwood, H. M., Houston.....	July 25, 1894.
Gilbert, J. E., San Antonio.....	July 8, 1903.
Gill, W. H., Palestine.....	July 26, 1899.
Glass, Hiram, Texarkana.....	July 28, 1897.
Goeth, C. A., San Antonio.....	July 8, 1903.
Goldsmith, J. D., Cleburne.....	July 12, 1905.
Gordon, W. D., Beaumont.....	July 11, 1906.
Gossett, M. H., Dallas.....	July 3, 1902.
Gray, C. J., Hallettsville.....	July 8, 1903.
Gregory, T. W., Austin.....	July 11, 1906.
Green, P. H., Hallettsville.....	July 8, 1903.
Greenwood, C. F., Hillsboro.....	July 3, 1902.
Greer, R. A., Beaumont.....	July 27, 1898.
Greiner, J. G., Del Rio.....	July 13, 1904.
Gresham, Walter, Galveston.....	July 17, 1882.
Grimes, S. F., Cuero.....	July 17, 1882.
Guinn, J. D., San Antonio.....	July 27, 1898.
Haizlip, J. D., Sherman.....	July 13, 1905.
Halbert, J. L., Corsicana.....	July 31, 1895.
Hale, Owen P., Paris.....	July 12, 1905.
Hamblen, Otis K., Houston.....	July 13, 1904.
Hamblen, E. P., Houston.....	July 13, 1904.
Haralson, E. M., Houston.....	July 13, 1904.

Hare, Silas, Jr., Sherman.....	July 13, 1904.
Harris, Edw. F., Galveston.....	July 27, 1892.
Harris, Jno. Chas., Houston.....	July 29, 1891.
Harris, R. C., Beaumont.....	July 13, 1904.
Harris, Theodore, San Antonio.....	July 27, 1898.
Hart, R. D., Texarkana.....	July 11, 1906.
Harwood, T. F., Gonzales.....	Dec. 12, 1882.
Hassell, J. W., Sherman.....	July 12, 1905.
Hawkins, E. A., Jr., Galveston.....	July 30, 1897.
Hay, W. L., Sherman.....	July 12, 1905.
Head, Hayden W., Sherman.....	July 13, 1904.
Hefley, W. T., Cameron.....	July 17, 1882.
Heilbron, A. E., San Antonio.....	July 9, 1903.
Henderson, J. M., Daingerfield.....	July 11, 1906.
Henderson, Jno. N., Bryan.....	July 10, 1889.
Henderson, T. S., Cameron.....	July 17, 1882.
Henry, Jno. L., Dallas.....	July 24, 1886.
Hicks, Marshall, San Antonio.....	July 8, 1903.
Hicks, Yale, San Antonio.....	July 27, 1898.
Hildebrand, Ira P., San Antonio.....	July 8, 1903.
Hill, James E., Livingston.....	Aug. 6, 1890.
Hill, James E., Jr., Livingston.....	July 25, 1894.
Hill, Sam'l F., Livingston.....	July 9, 1903.
Hill, J. W., San Angelo.....	July 11, 1906.
Holland, W. M., Dallas.....	July 2, 1902.
Holloway, Thos. T., Dallas.....	July 2, 1902.
Holt, Jesse F., Sherman.....	July 12, 1905.
Horton, Guy P., Sherman.....	July 12, 1905.
Houston, A. W., San Antonio.....	July 17, 1882.
Houston, Reagan, San Antonio.....	July 17, 1882.
Huff, S. P., Vernon.....	July 28, 1897.
Hughes, W. E., Dallas.....	July 31, 1896.
Hume, F. Chas., Houston.....	July 17, 1882.
Hume, F. Chas., Jr., Houston.....	July 26, 1899.
Humphrey, T. E., Austin.....	July 11, 1906.

Hunt, W. S., Houston.....	July 28, 1898.
Hurley, J. A., Texarkana.....	July 11, 1906.
Ingrum, R. P., San Antonio.....	July 8, 1903.
James, Jno. H., San Antonio.....	July 25, 1894.
Jester, C. L., Corsicana.....	July 29, 1897.
Jones, F. C., Houston.....	July 28, 1898.
Jones, J. T., Greenville.....	July 2, 1902.
Jones, Nat B., San Antonio.....	July 8, 1903.
Jones, Wm. M., Dallas.....	July 2, 1902.
Jones, B. L., Sherman.....	July 12, 1905.
Jones, S. P., Marshall.....	July 11, 1906.
Jordan, H. P., Waco.....	July 25, 1900.
Kassel, Charles, Sherman	July 8, 1903.
Keller, C. A., San Antonio.....	July 8, 1903.
Kelley, G. G., Wharton.....	July 29, 1896.
Kemp, Wyndham, El Paso.....	July 26, 1899.
Key, Scott W., Waco.....	July 11, 1906.
Key, Wm. M., Austin.....	July 25, 1894.
Keeling, W. A., Groesbeck.....	July 11, 1906.
King, John J., Texarkana.....	July 12, 1905.
Kittrell, N. G., Houston.....	Dec. 25, 1884.
Kittrell, N. G., Jr., Houston.....	July 13, 1904.
Kirby, A. H., Abilene.....	July 11, 1906.
Kleberg, M. E., Galveston.....	July 17, 1882.
Kleberg, Rudolph, Austin	July 17, 1882.
Kleiber, John I., Brownsville.....	July 8, 1903.
Knight, R. E. L., Dallas.....	July 25, 1894.
Kone, J. S., Denison.....	July 12, 1905.
Kopperl, M. O., Galveston.....	July 25, 1900.
Kopperl, M. A., Austin.....	July 2, 1902.
Krueger, C. G., Bellville.....	July 13, 1904.
Lamar, L. Q. C., Dallas.....	July 13, 1905.
Lane, Jonathan, Houston	July 17, 1882.
Lawrence, J. S., Sherman.....	July 12, 1905.
Leary, J. S., Sherman.....	July 11, 1906.

Leary, D. T., Texarkana.....	July 11, 1906.
Lee, Chas. K., Fort Worth.....	July 25, 1894.
Lee, Tom J., Galveston.....	July 27, 1899.
Leeper, Wadsworth D., Houston.....	July 13, 1904.
Lenert, Geo. E., La Grange.....	July 13, 1904.
Leonard, H. B., San Antonio.....	July 8, 1903.
Lewis, Perry J., San Antonio.....	July 31, 1895.
Lewis, Yancey, Dallas	July 2, 1902.
Levy, R. B., Longview.....	July 11, 1906.
Lindsley, Philip, Dallas.....	July 31, 1895.
Lipscomb, A. D., Beaumont.....	July 28, 1897.
Lightfoot, J. P., Austin.....	July 11, 1906.
Lively, Hiram F., Dallas.....	July 2, 1902.
Locke, Maurice E., Dallas.....	July 2, 1902.
Lockett, J. M., Houston	July 13, 1904.
Lockett, R. R., Texarkana.....	July 11, 1906.
Lockhart, Wm. B., Galveston.....	July 30, 1896.
Louis, B. F., Houston.....	July 13, 1904.
Love, Thos. B., Dallas.....	July 2, 1902.
Lovejoy, John, Houston.....	July 17, 1882.
Lovett, R. S., New York	July 11, 1889.
McBride, L. C., Dallas.....	July 2, 1902.
McCampbell, Jno. S., Corpus Christi.....	July 17, 1882.
McCormick, A. P., Dallas.....	July 29, 1891.
McDonald, D. D., Galveston.....	July 31, 1901.
McEachin, J. S., Richmond.....	July 28, 1897.
McGrady, J. G., Bonham.....	July 12, 1905.
McInnis, V. E., Sherman.....	July 12, 1905.
McKie, W. J., Corsicana.....	July 29, 1891.
McLaurin, Lauch, Dallas.....	July 25, 1900.
McLean, W. P., Fort Worth.....	July 24, 1886.
McLendon, J. W., Austin.....	July 11, 1906.
McMahon, J. B., Temple.....	July 28, 1897.
McNeal, Thos., Lockhart	May 5, 1885.
McRae, Chas. C., Houston.....	July 2, 1902.
Mahaffey, J. Q., Texarkana.....	July 11, 1906.

Malevinsky, M. L., Houston.....	July 25, 1894.
Mann, Geo. E., Galveston.....	July 17, 1882.
Martin, Thos. P., Beaumont.....	July 17, 1882.
Masterson, B. T., Galveston.....	July 17, 1882.
Masterson, Harris, Houston	July 13, 1904.
Masterson, Thos. W., Galveston.....	July 13, 1904.
Masterson, A. E., Angleton.....	July 13, 1904.
Mathis, W. J., Denison.....	July 12, 1905.
Maury, R. G., Houston.....	July 8, 1903.
Maxey, T. S., Austin.....	July 17, 1882.
Mayfield, Allison, Austin	July 12, 1905.
Miller, Clarence H., Austin.....	July 27, 1899.
Miller, Geo. E., Fort Worth.....	July 29, 1897.
Miller, T. S., Dallas.....	July 24, 1886.
Minor, F. D., Beaumont.....	July 17, 1882.
Montrose, T. D., Greenville.....	July 10, 1889.
Moody, L. B., Houston.....	July 29, 1896.
Moore, L. W., La Grange.....	July 2, 1902.
Moore, W. F., Cundiff.....	May 5, 1885.
Morgan, Richard, Dallas.....	July 17, 1882.
Moroney, W. J., Dallas.....	July 3, 1902.
Morrison, W. A., Rockdale.....	July 26, 1899.
Morrow, W. C., Hillsboro.....	July 26, 1899.
Moseley, A. G., Atoka, I. T.....	July 11, 1889.
Mott, M. F., Galveston.....	July 17, 1882.
Murphy, Thos. O., San Antonio.....	July 8, 1903.
Muse, J. C., Dallas.....	July 2, 1902.
Napier, W. P., San Antonio.....	July 11, 1906.
Neal, Geo. D., Navasota.....	July 26, 1893.
Neathery, Sam, McKinney.....	July 13, 1905.
Neblett, R. S., Corsicana.....	July 17, 1882.
Neethe, John, Galveston.....	July 8, 1903.
Neill, Robt. T., San Antonio.....	July 8, 1903.
Nelms, Hayne, Groveton.....	July 26, 1899.
Newman, F. M., Brady.....	July 31, 1901.

Nichols, Jos. F., Greenville.....	July 31, 1895.
Niday, Jas. E., Houston.....	July 13, 1904.
Norton, J. R., San Antonio.....	July 27, 1898.
Nunn, D. A., Jr., Crockett.....	July 25, 1894.
Oneal, H. F., Atlanta.....	July 11, 1906.
O'Brien, Geo. W., Beaumont.....	Dec. 14, 1883.
Ogden, Chas. W., San Antonio.....	July 8, 1903.
Onion, J. F. San Antonio.....	July 27, 1898.
Padelford, S. C., Cleburne.....	July 24, 1886.
Park, A. P., Paris.....	July 12, 1905.
Parker, Edwin B., Houston.....	July 27, 1898.
Parker, John W., Houston.....	July 30, 1896.
Parks, W. N., Brownsville.....	July 8, 1903.
Parr, J. K., Hillsboro.....	July 26, 1899.
Patteson, James, Cooper.....	July 2, 1902.
Peareson, D. R., Richmond.....	July 28, 1897.
Pearson, J. M., McKinney.....	July 8, 1903.
Peeler, John L., Austin.....	July 27, 1898.
Pendarvis, G. H., Houston.....	July 13, 1904.
Perkins, E. B., Dallas.....	July 24, 1886.
Perkins, E. G., Dallas.....	July 11, 1906.
Perryman, Sam R., Houston.....	July 11, 1889.
Phelps, Ed. S., Houston.....	July 13, 1904.
Phillips, Nelson, Dallas.....	July 3, 1902.
Pierson, Wm., Greenville.....	July 13, 1904.
Pleasants, R. A., Cuero.....	July 25, 1900.
Plowman, Geo. H., Dallas.....	July 24, 1886.
Pollard, Claude, Austin.....	July 11, 1906.
Potter, C. C., Gainesville.....	July 2, 1902.
Powell, Geo., San Antonio.....	July 8, 1903.
Powell, D. J., San Antonio.....	July 8, 1903.
Powell, Ben, Huntsville.....	July 11, 1906.
Proctor, F. C., Beaumont.....	July 29, 1891.
Proctor, D. C., Cuero.....	July 17, 1882.
Rainey, Anson, Dallas.....	July 17, 1882.

Randell, C. B., Sherman.....	July 12, 1905.
Reese, T. S., Hempstead.....	Dec. 14, 1883.
Rice, B. H., Marlin.....	July 27, 1898.
Robertson, Jas. M., Meridian.....	July 29, 1896.
Robertson, Jno. C., Dallas.....	July 11, 1906.
Robinson, C. W., Houston.....	July 13, 1904.
Robison, J. T., Daingerfield.....	July 11, 1906.
Robson, W. S., La Grange.....	July 17, 1882.
Rodgers, R. W., Texarkana.....	July 11, 1906.
Routledge, Jas., San Antonio.....	July 29, 1896.
Rowe, T. C., Houston.....	July 13, 1904.
Ruby, Jno. H., Houston.....	July 25, 1900.
Russell, Spencer C., Richmond.....	July 2, 1902.
Ryan, Jos., San Antonio.....	July 9, 1903.
Sallaway, H. B., San Antonio.....	July 8, 1903.
Saner, R. E. L., Dallas.....	July 25, 1900.
Sanford, A. D., Waco.....	July 25, 1900.
Sayers, J. D., Austin.....	July 17, 1882.
Schwartz, Saml., San Antonio.....	July 8, 1903.
Scott, Walter H., Houston.....	July 13, 1904.
Searcy, W. W., Brenham.....	July 17, 1882.
Sears, W. G., Houston.....	July 9, 1903.
Seeligson, A. W., San Antonio.....	July 8, 1903.
Sehorn, Jno., San Antonio.....	July 27, 1898.
Sexton, Rich. A., Marshall.....	July 11, 1906.
Shearon, Thomas, Dallas.....	July 13, 1904.
Shaw, W. N., Houston.....	Dec. 14, 1883.
Shepard, Seth, Washington, D. C.....	July 17, 1882.
Sheperd, Jas. L., Colorado.....	July 26, 1899.
Shropshire, J. E., Brady.....	July 12, 1905.
Simkins, W. S., Austin.....	July 17, 1882.
Simmons, D. E., Austin.....	July 25, 1900.
Smith, Tilman, Fort Worth.....	July 30, 1896.
Smith, W. J. J., Dallas.....	July 2, 1902.
Smith, C. H., Sherman.....	July 12, 1905.

Smith, R. E., Sherman.....	July 13, 1905.
Smelser, S. H., Texarkana.....	July 11, 1906.
Sonfield, Leon, Beaumont.....	July 25, 1900.
Spearman, Robt. F., Greenville.....	July 13, 1905.
Speer, Ocie, Fort Worth.....	July 13, 1904.
Spence, Jos., Jr., San Angelo.....	July 31, 1895.
Spence, W., Dallas	July 24, 1886.
Spencer, F. M., Galveston.....	July 17, 1882.
Spivey, A. Newt, Atlanta.....	July 11, 1906.
Spivey, Jno. W., Marlin.....	July 11, 1906.
Spoons, M. A., Fort Worth.....	July 25, 1894.
Spoons, Marshall, Fort Worth.....	July 12, 1905.
Standifer, I. M., Houston.....	July 31, 1895.
Steger, Thos. P., Bonham.....	July 12, 1905.
Stewart, Jno. S., Houston.....	July 29, 1896.
Stewart, Maco, Galveston	July 25, 1894.
Stinchcomb, T. B., Longview.....	July 11, 1906.
Stone, T. H., Houston.....	July 28, 1898.
Storey, L. J., Austin.....	May 5, 1885.
Street, Robt. G., Galveston.....	July 17, 1882.
Streetman, Sam, Houston.....	July 28, 1897.
Stubbs, Chas. J., Galveston.....	July 25, 1900.
Stubbs, Jas. B., Galveston.....	July 17, 1882.
Suggs, J. T., Denison.....	July 12, 1905.
Sullivan, J. C., San Antonio.....	July 8, 1903.
Swearingen, P. H., San Antonio.....	July 8, 1903.
Taliaferro, Sinclair, Houston.....	July 17, 1882.
Talbot, J. M., Dallas	July 11, 1906.
Tarlton, B. D., Austin.....	July 17, 1882.
Templeton, Howard, Sulphur Springs.....	July 2, 1902.
Terrell, J. M., Daingerfield.....	July 11, 1906.
Terrell, J. O., San Antonio	July 17, 1882.
Terrell, A. W., Austin.....	July 17, 1882.
Terry, J. W., Galveston.....	July 17, 1882.
Thomas, W. S., Texarkana.....	July 11, 1906.

Thompson, J. W., Dallas.....	July 2, 1902.
Thompson, Wm., Dallas.....	July 29, 1897.
Thompson, Geo., Fort Worth.....	July 13, 1905.
Thurmond, P. C., Bonham.....	July 12, 1905.
Tod, Jno. G., Houston.....	July 11, 1889.
Todd, Chas. S., Texarkana.....	July 17, 1882.
Tompkins, Arthur C., Hempstead.....	July 10, 1889.
Townes, Jno. C., Austin.....	July 29, 1896.
Tucker, Chas. F., Dallas.....	July 24, 1886.
Turner, P. A., Texarkana.....	July 12, 1905.
Turney, W. W., El Paso.....	July 27, 1898.
Upthegrove, Daniel, Dallas.....	July 12, 1905.
Vinson, W. A., Sherman.....	July 12, 1905.
Waggener, Leslie, Dallas.....	July 13, 1905.
Wagstaff, J. M., Abilene.....	July 11, 1906.
Walker, Jno. C., Galveston.....	July 17, 1882.
Wall, Jno. C., Sherman.....	July 12, 1905.
Ward, R. H., San Antonio.....	July 8, 1903.
Wash, F. H., San Antonio.....	July 29, 1896.
Watkins, A. B., Athens.....	July 2, 1902.
Watkins, Edgar, Houston.....	July 31, 1895.
Wear, W. C., Hillsboro.....	July 11, 1889.
Webb, G. P., Sherman.....	July 13, 1905.
Welch, Stanley, Corpus Christi.....	July 25, 1900.
Wharton, C. R., Houston.....	July 25, 1900.
Wheeler, J. T., Galveston.....	July 11, 1906.
Wilkerson, J. D., Beaumont.....	July 13, 1904.
Wilkinson, A. E., Austin.....	July 25, 1894.
Williams, Chas. S., Caldwell.....	July 25, 1894.
Williams, Eugene, Waco.....	July 17, 1882.
Williams, F. A., Austin.....	July 25, 1894.
Williams, Mason, San Antonio.....	July 8, 1903.
Williams, Wm. D., Fort Worth.....	May 5, 1885.
Wilson, J. I., Houston.....	July 2, 1902.
Wilson, Wm. H., Houston.....	July 28, 1897.

Winter, J. G., Waco.....	July 24, 1886.
Wolfe, J. A. L., Sherman.....	July 12, 1905.
Wood, J. H., Sherman.....	July 27, 1898.
Wood, Houston, Dallas	July 11, 1906.
Wozencraft, A. P., Dallas.....	July 29, 1896.
Wren, Clark C., Houston.....	July 13, 1904.
Young, Jno. L., Dallas.....	July 28, 1897.
Young, J. L., Cooper.....	July 12, 1905.

HONORARY MEMBERS.

Brewer, David J.....	Washington, D. C.
Howe, William Wirt.....	New Orleans, La.
Spencer, Selden P.....	St. Louis, Mo.

ROLL OF MEMBERS ARRANGED BY COUNTIES.

ANDERSON COUNTY.

T. M. Campbell..... Palestine.
W. H. Gill..... Palestine.

AUSTIN COUNTY.

S. R. Blake..... Bellville.
A. Chesley Bellville.
C. G. Krueger..... Bellville.

BEE COUNTY.

J. C. Crisp..... Beeville.

BELL COUNTY.

J. B. McMahon..... Temple.

BEKAR COUNTY.

Wm. Aubrey San Antonio.
Robt. L. Ball..... San Antonio.
C. L. Bass..... San Antonio.
C. L. Bates..... San Antonio.
Sam'l Belden, Jr..... San Antonio.
W. C. Berry..... San Antonio.
S. J. Brooks..... San Antonio.
H. C. Carter..... San Antonio.
J. D. Childs..... San Antonio.
Jno. H. Clarke..... San Antonio.
W. E. Cox..... San Antonio.
A. M. Cunningham..... San Antonio.
M. W. Davis..... San Antonio.
L. G. Denman..... San Antonio.
M. O. Flowers..... San Antonio.

Thos. H. Franklin.....	San Antonio.
W. B. Garrett.....	San Antonio.
J. E. Gilbert.....	San Antonio.
C. A. Goeth.....	San Antonio.
J. D. Guinn.....	San Antonio.
Theodore Harris	San Antonio.
A. E. Heilbron.....	San Antonio.
Marshall Hicks	San Antonio.
Yale Hicks	San Antonio.
Ira P. Hildebrand.....	San Antonio.
A. W. Houston.....	San Antonio.
Reagan Houston	San Antonio.
R. P. Ingram.....	San Antonio.
Jno. H. James.....	San Antonio.
Nat B. Jones.....	San Antonio.
C. A. Keller.....	San Antonio.
H. B. Leonard.....	San Antonio.
Perry J. Lewis.....	San Antonio.
Thos. O. Murphy.....	San Antonio.
Robt. T. Neill.....	San Antonio.
W. P. Napier.....	San Antonio.
J. R. Norton.....	San Antonio.
Chas. W. Ogden.....	San Antonio.
J. F. Onion.....	San Antonio.
Geo. Powell	San Antonio.
D. J. Powell.....	San Antonio.
Jas. Routledge	San Antonio.
Jos. Ryan	San Antonio.
H. B. Salliway.....	San Antonio.
Saml. Schwartz	San Antonio.
A. W. Seeligson.....	San Antonio.
John Sehorn	San Antonio.
J. C. Sullivan.....	San Antonio.
P. H. Swearingen.....	San Antonio.
J. O. Terrell.....	San Antonio.

ROLL OF MEMBERS

R. H. Ward.....	San Antonio.
F. H. Wash.....	San Antonio.
Mason Williams	San Antonio.

BOSQUE COUNTY.

Jas. M. Robertson.....	Meridian.
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BOWIE COUNTY.

Geo. J. Armistead.....	Texarkana.
W. L. Estes.....	Texarkana.
R. P. Dorough.....	Texarkana.
J. E. Garland.....	Texarkana.
Hiram Glass	Texarkana.
R. D. Hart.....	Texarkana.
J. A. Hurley.....	Texarkana.
Jno. J. King.....	Texarkana.
D. T. Leary.....	Texarkana.
R. R. Lockett.....	Texarkana.
J. Q. Mahaffey.....	Texarkana.
R. W. Rodgers.....	Texarkana.
S. H. Smelson.....	Texarkana.
Chas. S. Todd.....	Texarkana.
W. S. Thomas.....	Texarkana.
P. A. Turner.....	Texarkana.

BRAZORIA COUNTY.

A. E. Masterson.....	Angleton.
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BRAZOS COUNTY.

Jno. N. Henderson.....	Bryan.
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BURLESON COUNTY.

Chas. S. Williams.....	Caldwell.
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CALDWELL COUNTY.

Thos. McNeal	Lockhart.
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CAMERON COUNTY.

Jno. I. Kleiber.....	Brownsville.
W. N. Parks.....	Brownsville.

CASS COUNTY.

W. B. Figures.....	Atlanta.
H. F. Oneal.....	Atlanta.
E. Newt. Spivey.....	Atlanta.

COLLIN COUNTY.

W. B. Abernathy.....	McKinney.
Sam Neathery	McKinney.
J. M. Pearson.....	McKinney.

COOK COUNTY.

C. C. Potter.....	Gainesville.
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DALLAS COUNTY.

W. M. Alexander.....	Dallas.
J. M. Avery.....	Dallas.
Rhodes S. Baker.....	Dallas.
F. W. Bartlett.....	Dallas.
H. R. Bondies.....	Dallas.
John Bookhout	Dallas.
Ed. M. Browder.....	Dallas.
M. M. Brooks.....	Dallas.
Wm. H. Clark.....	Dallas.
Jos. E. Cockrell.....	Dallas.
Henry C. Coke.....	Dallas.
M. M. Crane.....	Dallas.
M. L. Crawford, Sr.....	Dallas.
M. L. Crawford, Jr.....	Dallas.
W. L. Crawford.....	Dallas.
Chas. A. Culberson.....	Dallas.
N. W. Finley.....	Dallas.

M. H. Gossett.....	Dallas.
Jno. L. Henry.....	Dallas.
W. M. Holland.....	Dallas.
Thos. T. Holloway.....	Dallas.
W. E. Hughes.....	Dallas.
Wm. M. Jones.....	Dallas.
R. E. L. Knight.....	Dallas.
L. Q. C. Lamar.....	Dallas.
Yancey Lewis.....	Dallas.
Philip Lindsley.....	Dallas.
Hiram F. Lively.....	Dallas.
Maurice E. Locke.....	Dallas.
Thos. B. Love.....	Dallas.
A. P. McCormick.....	Dallas.
L. C. McBride.....	Dallas.
Lauch McLaurin.....	Dallas.
T. S. Miller.....	Dallas.
Richard Morgan.....	Dallas.
W. J. Moroney.....	Dallas.
J. C. Muse.....	Dallas.
E. B. Perkins.....	Dallas.
E. G. Perkins.....	Dallas.
Nelson Phillips.....	Dallas.
Geo. H. Plowman.....	Dallas.
Anson Rainey.....	Dallas.
Jno. C. Robertson.....	Dallas.
R. E. L. Saner.....	Dallas.
Thos. Shearon.....	Dallas.
Seth Shepard.....	Washington, D. C.
W. J. J. Smith.....	Dallas.
Wendel Spence, Jr.....	Dallas.
J. M. Talbot.....	Dallas.
J. W. Thompson.....	Dallas.
Wm. Thompson.....	Dallas.
Chas. F. Tucker.....	Dallas.

Daniel Upthegrove	Dallas.
Leslie Waggener	Dallas.
Houston Wood	Dallas.
A. P. Wozencraft	Dallas.
Jno. L. Young.....	Dallas.

DELTA COUNTY.

Jas. Patteson	Cooper.
J. L. Young.....	Cooper.

DE WITT COUNTY.

S. F. Grimes.....	Cuero.
R. A. Pleasants.....	Cuero.
D. C. Proctor.....	Cuero.

EL PASO COUNTY.

T. J. Beall.....	El Paso.
Beauregard Bryan	El Paso.
R. F. Burges.....	El Paso.
Wm. H. Burges.....	El Paso.
Wm. M. Coldwell.....	El Paso.
Jno. L. Dyer, Jr.....	El Paso.
Peyton F. Edwards.....	El Paso.
Wyndham Kemp	El Paso.
Walter H. Scott.....	El Paso.
W. W. Turney.....	El Paso.

FALLS COUNTY.

Tom Connally	Marlin.
B. H. Rice.....	Marlin.
J. W. Spivey.....	Marlin.

FANNIN COUNTY.

Tom C. Bradley.....	Bonham.
H. G. Evans.....	Bonham.
W. A. Evans.....	Bonham.

ROLL OF MEMBERS

J. G. McGrady.....	Bonham.
Mark McMahon	Bonham.
Thos. P. Steger.....	Bonham.
P. C. Thurmond.....	Bonham.

FAYETTE COUNTY.

Jno. T. Duncan.....	La Grange.
Geo. E. Lenert.....	La Grange.
L. W. Moore.....	La Grange.
W. S. Robson.....	La Grange.

FORT BEND COUNTY.

J. S. McEachin.....	Richmond.
D. R. Pearson.....	Richmond.
Spencer C. Russell.....	Richmond.

GALVESTON COUNTY.

W. T. Armstrong.....	Galveston.
Geo. J. Clough.....	Galveston.
Geo. E. Coll.....	Galveston.
P. A. Drouilhet.....	Galveston.
Lewis Fisher	Galveston.
Walter Gresham	Galveston.
Edward F. Harris.....	Galveston.
E. A. Hawkins, Jr.....	Galveston.
M. E. Kleberg.....	Galveston.
M. O. Kopperl.....	Galveston.
Tom J. Lee.....	Galveston.
Wm. B. Lockhart.....	Galveston.
D. D. McDonald.....	Galveston.
Geo. E. Mann.....	Galveston.
B. T. Masterson.....	Galveston.
Thos. W. Masterson.....	Galveston.
M. F. Mott.....	Galveston.
John Neethe	Galveston.
F. M. Spencer	Galveston.

Robt. G. Street.....	Galveston.
Chas. J. Stubbs.....	Galveston.
Jas. B. Stubbs.....	Galveston.
J. W. Terry.....	Galveston.
Jno. C. Walker.....	Galveston.
J. T. Wheeler.....	Galveston.

GONZALES COUNTY.

T. F. Harwood.....	Gonzales.
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GRAYSON COUNTY.

Hamp B. Abney.....	Sherman.
Chas. Batsell	Sherman.
A. L. Beaty.....	Sherman.
Don A. Bliss.....	Sherman.
T. J. Brown.....	Sherman.
E. F. Brown.....	Sherman.
J. R. Campbell.....	Sherman.
James L. Cobb.....	Sherman.
A. R. Dean.....	Sherman.
N. H. L. Decker.....	Denison.
F. C. Dillard.....	Sherman.
F. B. Dillard.....	Sherman.
L. B. Eppstein.....	New York.
J. W. Finley.....	Sherman.
C. J. Freeman.....	Sherman.
B. F. Gafford.....	Sherman.
C. L. Galloway.....	Sherman.
J. D. Haizlip.....	Sherman.
Silas Hare, Jr.....	Sherman.
J. W. Hassell.....	Sherman.
W. L. Hay.....	Sherman.
Hayden W. Head.....	Sherman.
Jesse F. Holt.....	Sherman.
Guy P. Horton	Sherman.
B. L. Jones.....	Sherman.

ROLL OF MEMBERS

Chas. Kassel	Sherman.
J. S. Kone.....	Denison.
J. S. Lawrence.....	Sherman.
J. S. Leary.....	Sherman.
V. E. McInnis.....	Sherman.
W. J. Mathis.....	Denison.
A. G. Moseley.....	Atoka, I. T.
C. B. Randell.....	Sherman.
C. H. Smith.....	Sherman.
R. E. Smith.....	Sherman.
J. T. Suggs.....	Denison.
W. A. Vinson.....	Sherman.
Jno. C. Wall.....	Sherman.
G. P. Webb.....	Sherman.
J. A. L. Wolfe.....	Sherman.
J. H. Wood.....	Sherman.

GREGG COUNTY.

R. B. Levy.....	Longview.
T. B. Stinchcomb.....	Longview.

GRIMES COUNTY.

Gordon Boone	Navasota.
Geo. D. Neal.....	Navasota.

HARRIS COUNTY.

W. M. Anderson.....	Houston.
Frank Andrews	Houston.
Jesse Andrews	Houston.
Chas. E. Ashe.....	Houston.
Edward H. Bailey.....	Houston.
Jas. A. Baker, Jr.....	New York, N. Y.
J. C. Baldwin.....	Houston.
T. H. Ball.....	Houston.
Will L. Barbee.....	Houston.
Wharton Bates	Houston.

H. L. Borden.....	Houston.
Thos. H. Botts.....	Houston.
Lewis R. Bryan.....	Houston.
Chester H. Bryan.....	Houston.
W. T. Burns.....	Houston.
Elliott Cage	Houston.
J. W. Campbell.....	Houston.
C. L. Carter.....	Houston.
Saml. B. Dabney.....	Houston.
H. J. Dannenbaum.....	Houston.
Joe H. Eagle.....	Houston.
Presley K. Ewing.....	Houston.
T. W. Ford.....	Houston.
T. C. Ford.....	Houston.
H. M. Garwood.....	Houston.
E. P. Hamblen.....	Houston.
Otis K. Hamblen	Houston.
E. M. Haralson.....	Houston.
Jno. C. Harris.....	Houston.
F. Chas. Hume.....	Houston.
F. Chas. Hume, Jr.....	Houston.
W. S. Hunt.....	Houston.
F. C. Jones.....	Houston.
N. G. Kittrell, Sr.....	Houston.
N. G. Kittrell, Jr.....	Houston.
Jonathan Lane	Houston.
Wadsworth D. Leeper.....	Houston.
J. W. Lockett.....	Houston.
B. F. Louis.....	Houston.
Jno. Lovejoy	Houston.
R. S. Lovett.....	New York, N. Y.
J. M. Lockett.....	Houston.
Chas. C. McRae.....	Houston.
M. L. Malevinsky.....	Houston.
Harris Masterson	Houston.
R. G. Maury.....	Houston.

ROLL OF MEMBERS

L. B. Moody.....	Houston.
Jas. E. Niday.....	Houston.
Edward B. Parker.....	Houston.
Jno. W. Parker.....	Houston.
G. H. Pendarvis.....	Houston.
Sam R. Perryman.....	Houston.
Ed. S. Phelps.....	Houston.
C. W. Robinson.....	Houston.
T. C. Rowe.....	Houston.
Jno. H. Ruby.....	Houston.
W. G. Sears.....	Houston.
W. N. Shaw.....	Houston.
I. M. Standifer.....	Houston.
Jno. S. Stewart.....	Houston.
T. H. Stone.....	Houston.
Sam Streetman	Houston.
Sinclair Taliaferro	Houston.
Jno. G. Tod.....	Houston.
Edgar Watkins	Houston.
C. R. Wharton.....	Houston.
J. I. Wilson.....	Houston.
Wm. H. Wilson.....	Houston.
Clark C. Wren.....	Houston.

HARRISON COUNTY.

S. P. Jones.....	Marshall.
Rich. A. Sexton.....	Marshall.

HASKELL COUNTY.

Arthur C. Foster.....	Haskell.
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HENDERSON COUNTY.

A. B. Watkins.....	Athens.
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HILL COUNTY.

Jos. Abbott	Hillsboro.
C. F. Greenwood.....	Hillsboro.

W. C. Morrow.....	Hillsboro.
J. K. Parr.....	Hillsboro.
W. C. Wear.....	Hillsboro.

HOPKINS COUNTY.

V. M. Clark.....	Sulphur Springs.
H. C. Connor.....	Sulphur Springs.
J. H. Dinsmore.....	Sulphur Springs.
Howard Templeton	Sulphur Springs.

HOUSTON COUNTY.

D. A. Nunn, Jr.....	Crockett.
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HUNT COUNTY.

John T. Craddock.....	Greenville.
J. T. Jones.....	Greenville.
T. D. Montrose.....	Greenville.
Jas. F. Nichols.....	Greenville.
Wm. Pierson	Greenville.
Robt. E. Spearman.....	Greenville.

JACK COUNTY.

W. F. Moore.....	Cundiff.
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JASPER COUNTY.

Jno. T. Beaty.....	Jasper.
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JEFFERSON COUNTY.

Jas. L. Autrey.....	Beaumont.
Walter J. Crawford.....	Beaumont.
W. M. Crook.....	Beaumont.
F. J. Duff.....	Beaumont.
R. C. Duff.....	Beaumont.
A. L. Davis.....	Beaumont.
W. D. Gordon.....	Beaumont.
R. A. Greer.....	Beaumont.

ROLL OF MEMBERS

R. C. Harris.....	Beaumont.
A. D. Lipscomb.....	Beaumont.
Thos. P. Martin.....	Beaumont.
F. D. Minor.....	Beaumont.
Geo. W. O'Brien.....	Beaumont.
F. C. Proctor.....	Beaumont.
Leon Sonfield	Beaumont.
J. D. Wilkerson.....	Beaumont.

JOHNSON COUNTY.

L. B. Davis.....	Cleburne.
J. D. Goldsmith.....	Cleburne.
S. C. Padelford.....	Cleburne.

KARNES COUNTY.

A. J. Bell.....	Karnes City.
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KAUFMAN COUNTY.

J. Adams	Kaufman.
W. H. Allen.....	Terrell.

KERR COUNTY.

R. H. Burney.....	Kerrville.
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LAMAR COUNTY.

B. J. Baldwin.....	Paris.
E. S. Connor.....	Paris.
A. P. Dohoney.....	Paris.
Owen P. Hale.....	Paris.
A. P. Park	Paris.

LAVACA COUNTY.

C. J. Gray.....	Hallettsville.
P. H. Green.....	Hallettsville.

LIMESTONE COUNTY.

C. S. Bradley.....	Groesbeck.
W. A. Keeling.....	Groesbeck.

MARION COUNTY.

W. T. Armistead.....Jefferson.
J. H. Benefield.....Jefferson.

MORRIS COUNTY.

Jno. M. Henders.....Daingerfield.
S. J. Robinson.....Daingerfield.
J. M. Terrell.....Daingerfield.

M'CULLOCH COUNTY.

F. M. Newman.....Brady.
J. E. Shropshire.....Brady.

M'LENNAN COUNTY.

H. P. Jordan.....Waco.
Scott W. Key.....Waco.
A. D. Sanford.....Waco.
Eugene Williams.....Waco.
J. G. Winter.....Waco.

MILAM COUNTY.

W. T. Hefley.....Cameron.
T. S. Henderson.....Cameron.
W. A. Morrison.....Rockdale.

MITCHELL COUNTY.

Jas. L. Sheperd.....Colorado.

NAVARRO COUNTY.

W. W. Ballew.....Corsicana.
Lewis R. Carpenter.....Corsicana.
J. L. Halbert.....Corsicana.
C. L. Jester.....Corsicana.
W. J. McKie.....Corsicana.
R. S. Neblett.....Corsicana.

ROLL OF MEMBERS

NUBORS COUNTY.

Jno. S. McCampbell.....Corpus Christi.
Stanley WelchCorpus Christi.

POLK COUNTY.

J. C. Feagin.....Livingston.
Jas. E. Hill, Sr.....Livingston.
Jas. E. Hill, Jr.....Livingston.
Saml. F. Hill.....Livingston.

RED RIVER COUNTY.

E. S. Chambers.....Clarksville.
C. M. Chambers.....Clarksville.

SMITH COUNTY.

Jno. M. Duncan.....Tyler.

TAYLOR COUNTY.

A. H. Kirby.....Abilene.
J. M. Wagstaff.....Abilene.

TARRANT COUNTY.

C. K. Bell.....Fort Worth.
T. H. Barwise, Jr.....Fort Worth.
S. B. Cantey.....Fort Worth.
Chas. K. Lee.....Fort Worth.
W. P. McLean.....Fort Worth.
Geo. E. Miller.....Fort Worth.
Tillman Smith.....Fort Worth.
M. A. Spoonts.....Fort Worth.
Marshall Spoonts.....Fort Worth.
Ocie Speer.....Fort Worth.
Geo. Thompson.....Fort Worth.
B. R. Webb.....Fort Worth.
Wm. D. Williams.....Fort Worth.

TITUS COUNTY.

A. L. Burford.....Mt. Pleasant.

TOM GREEN COUNTY.

J. W. Hill.....San Angelo.

Jos. Spence, Jr.....San Angelo.

TRAVIS COUNTY.

W. P. Allen.....Austin.
 R. L. Brown.....Austin.
 T. B. Cochran.....Austin.
 B. H. Connerly.....Austin.
 B. V. Davidson.....Austin.
 Sam R. Fisher.....Austin.
 R. R. Gaines.....Austin.
 T. W. Gregory.....Austin.
 Wm. M. Key.....Austin.
 Rudolph KlebergAustin.
 M. A. Kopperl.....Austin.
 J. P. Lightfoot.....Austin.
 T. S. Maxey.....Austin.
 Allison MayfieldAustin.
 Clarence H. Miller.....Austin.
 J. W. McLendon.....Austin.
 Jno. L. Peeler.....Austin.
 Claude Pollard.....Austin.
 J. D. Sayers.....Austin.
 W. S. Simkins.....Austin.
 D. E. Simmons.....Austin.
 L. J. Storey.....Austin.
 B. D. Tarlton.....Austin.
 A. W. Terrell.....Austin.
 Jno. C. Townes.....Austin.
 A. E. Wilkinson.....Austin.
 F. A. Williams.....Austin.

ROLL OF MEMBERS

TRINITY COUNTY.

B. F. Bean.....Groveton.
Hayne NelmsGroveton.

UPSHUR COUNTY.

F. S. Eberhart.....Gilmer.

VAL VERDE COUNTY.

J. G. Greiner.....Del Rio.

WALKER COUNTY.

T. E. Humphrey.....Huntsville.
Ben PowellHuntsville.

WALLER COUNTY.

T. S. Reese.....Hempstead.
Arthur C. TompkinsHempstead.

WASHINGTON COUNTY.

C. C. Garrett.....Brenham.
W. W. Searcy.....Brenham.

WEBB COUNTY.

E. A. Atlee.....Laredo.
Thos. W. Dodd.....Laredo.

WHARTON COUNTY.

G. G. Kelley.....Wharton.

WILBARGER COUNTY.

S. P. Huff.....Vernon.

WISE COUNTY.

R. E. Carswell.....Decatur.

DECEASED MEMBERS.

ADAMS, Z. T., Kaufman. Died January 6, 1886.
ANDERSON, JAS. M., Waco. Died June 3, 1889.
ANDREWS, A. W., Terrell. Died February 15, 1887.
ARCHER, OSCEOLA, Austin. Died April, 1898.
AUSTIN, WM. J., Denton. Died September 7, 1888.

BAKER, JAS. A., SR., Houston. Died February 23, 1897.
BALL, F. W., Fort Worth. Died September 9, 1900.
BALLINGER, T. J., Galveston. Died October 27, 1899.
BALLINGER, W. P., Galveston. Died January 28, 1888.
BASSETT, B. H., Dallas. Died July 15, 1893.
BLEDSOE, D. T., Cleburne. Died _____.
BONNER, M. H., Tyler. Died November 25, 1883.
BOTTS, W. B., Houston. Died March 7, 1894.
BRADLEY, L. D., Fairfield. Died October 6, 1886.
BRADSHAW, C. J., La Grange. Died June 13, 1888.
BRYANT, J. D., Richmond. Died August 16, 1904.
BURGES, W. H., Seguin. Died 1897.
BURTS, J. H., Austin. Died January 15, 1894.

CARRINGTON, W. A., Houston. Died July 14, 1892.
CLEVELAND, C. L., Galveston. Died February, 1892.
COOPER, M. S., Conroe. Died May, 1899.
CRAIN, W. H., Cuero. Died February 10, 1896.
CROOM, J. L., JR., Wharton. Died August 2, 1890.

DAVIS, GEORGE W., Dallas. Died September, 1898.
DEVINE, THOS. J., San Antonio. Died March 16, 1890.

FLOOD, W. W., Fort Worth. Died December, 1904.
FORD, P. S., Cameron. Died December 11, 1893.
FRISBIE, W. H., Groesbeck. Died September 13, 1883.

GARRETT, C. C., Brenham. Died September 15, 1905.
GARRETT, N. P., Cameron. Died August 3, 1888.
GILES, W. M., Mineola. Died 1901.
GIVENS, J. S., Corpus Christi. Died January 20, 1887.
GOLDTHWAITE, GEORGE, Houston. Died April 23, 1897.
GOSLING, H. L., Castroville. Died February 21, 1885.
GOULD, ROBERT S., Austin. Died 1904.
GRANBERRY, M. C., Austin. Died _____.
GREEN, JOHN A., SR., San Antonio. Died July 8, 1899.
GREENE, S. P., Fort Worth. Died 1904.
GRESHAM, WALTER, JR., Galveston. Died January 15, 1905.
GUINN, R. H., Rusk. Died January 13, 1888.

- HAGGERTY, J. J., Bellville. Died April 7, 1893.
HANCOCK, JOHN, Austin. Died July 19, 1893.
HARRIS, JAS. L., Dallas. Died ———.
HARWOOD, THOS. M., Gonzales. Died January 29, 1900.
HERRING, M. D., Waco. Died November 27, 1897.
HILL, GEORGE L., Gainesville. Died July 25, 1887.
HILL, R. J., Austin. Died March 30, 1899.
HOLMES, H. M., Mason. Died August 17, 1895.
HURT, J. M., Dallas. Died ———.
HUTCHINGS, R. M., Galveston. Died August 22, 1895.

JACKSON, A. M., SR., Austin. Died July 11, 1889.
JACKSON, A. M., JR., Austin. Died August 17, 1894.
JOHN, A. S., Beaumont. Died February 5, 1899.
JOHNSON, BYRON, Galveston. Died March 2, 1900.
JONES, C. ANSON, Houston. Died January 10, 1888.

KENNARD, JOHN R., Anderson. Died October 24, 1884.
KILGORE, S. B., Wills Point. Died December 10, 1891.
KIRK, LAFAYETTE, Brenham. Died July 29, 1893.

LABATT, HENRY J., Galveston. Died September 8, 1900.
LANGUILLE, P. T., Galveston. Died October 14, 1882.
LEDBETTER, W. H., La Grange. Died April 24, 1896.
LEVI, LEO N., New York. Died ———.
LIGHTFOOT, HENRY W., Paris. Died August, 1901.
LOGUE, L. J., Columbus. Died May 15, 1884.
LOOSCAN, M., Houston. Died September 7, 1897.

MANN, H. K., Galveston. Died December 14, 1888.
MASON, GEORGE, Galveston. Died February 3, 1896.
MASON, J. R., San Antonio. Died July 29, 1888.
MASTERSON, B. T., JR., Galveston. Died 1897.
MASTERSON, J. HARRIS, Galveston. Died June 27, 1905.
MAXEY, S. B., Paris. Died August 16, 1895.
McCLELLAN, E. D., Bonham. Died November 28, 1899.
McCOY, JNO. C., Dallas. Died April 30, 1887.
McLEMORE, M. C., Galveston. Died July 23, 1897.
MOORE, GEORGE F., Austin. Died August 30, 1883.
MOORE, JNO. M., Edna. Died ———.
MORSE, CHAS. S., Austin. Died May 13, 1902.

NOBLE, S. B., Galveston. Died March 20, 1890.

OCHSE, J. F., San Antonio. Died September 24, 1888.

PASCHALL, GEORGE, San Antonio. Died September 7, 1894.
PEARSON, P. E., Richmond. Died July 31, 1896.
PECK, L. D., Fairfield. Died May 30, 1885.
PEELER, A. J., Austin. Died November 3, 1886.
PHELPS, R. H., La Grange. Died March 24, 1898.
PONTON, T. J., Gonzales. Died December 9, 1899.
PRATHER, WM. L., Austin. Died July 24, 1905.
PRENDERGAST, H. D., Austin. Died November 5, 1886.

QUINAN, GEORGE, Wharton. Died January 25, 1893.

READ, N. C., Corsicana. Died October 25, 1884.
ROBERTS, O. M., Austin. Died May 19, 1898.
ROBERTSON, JNO. W., Austin. Died June 30, 1892.
ROBERTSON, SAWNIE, Dallas. Died June 21, 1892.
ROBSON, W. S., La Grange. Died October 7, 1905.
RUCKER, W. T., Belton. Died August 10, 1885.

SAYLES, JOHN, Abilene. Died 1897.
SCOTT, J. Z. H., Galveston. Died January 18, 1904.
SEMPLE, J. M., Sherman. Died ———.
SEXTON, FRANK B., El Paso-Marshall. Died May 15, 1900.
SHELLEY, N. G., Austin. Died January 5, 1898.
SHROPSHIRE, E. L., Comanche. Died July 4, 1894.
SIMKINS, E. J., Corsicana. Died June 25, 1903.
SIMPSON, ISAAC P., San Antonio. Died 1896.
SMITH, THOS. H., Hillsboro. Died March 15, 1901.
STAYTON, JNO. W., Victoria. Died July 5, 1894.
STEWART, CLEGG, Galveston. Died January 15, 1902.
STEWART, JOE H., Austin. Died August 14, 1890.
SWEARINGEN, J. T., Brenham. Died August 14, 1890.

TEICHMULLER, H., La Grange. Died February 17, 1901.
TEMPLETON, JOHN D., Fort Worth. Died April 24, 1893.
TIMMONS, B., La Grange. Died June 17, 1884.
TUCKER, PHILIP C., Galveston. Died July 9, 1894.

WAEELDER, JACOB, San Antonio. Died August 28, 1897.
WALKER, A. S., SR., Austin. Died August 14, 1896.
WALKER, RICHARD S., Galveston. Died May 24, 1892.
WALLACE, W. R., Castroville. Died November 12, 1894.
WALTHALL, L. N., San Antonio. Died February 22, 1894.
WARD, P. H., San Antonio. Died January 28, 1899.
WAUL, THOS. N., Neyland. Died ———.
WEBB, BRITTON R., Fort Worth. Died June 28, 1906.
WEST, CHAS. S., Austin. Died October 23, 1895.
WEST, ROBERT G., Austin. Died April 26, 1904.
WHEELER, ROYALL T. Died 1900.
WHITE, JNO. P., Austin. Died January 16, 1905.
WILKES, F. D., Lampasas. Died November 21, 1886.
WILLIE, ASA H., Galveston. Died March 16, 1899.
WILSON, SAM A., Rusk. Died January 24, 1891.

[Note.—The Secretary requests all members to notify him promptly of the death of any member of the Association.]

NEW MEMBERS.

The following lawyers were admitted to membership in the Texas Bar Association at its meeting at Texarkana on July 11 and 12, 1906:

Armistead, Geo. J.....	Texarkana.
Armistead, W. T.....	Jefferson
Ballew, W. W.....	Corsicana.
Barwise, T. S.....	Fort Worth.
Benefeld, J. H.....	Jefferson.
Chambers, C. M.....	Clarksville.
Clough, Geo. G.....	Galveston.
Dabney, S. B.....	Houston.
Davis, A. L.....	Beaumont.
Dorough, R. P.....	Tyler.
Figures, Wm. B.....	Atlanta.
Garland, J. E.....	Texarkana.
Gordon, W. D.....	Beaumont.
Gregory, T. W.....	Austin.
Hart, R. D.....	Texarkana.
Henderson, J. M.....	Daingerfield.
Hill, J. W.....	San Angelo.
Hurley, J. A.....	Texarkana.
Jones, S. P.....	Marshall.
Keeling, W. A.....	Groesbeck.
Key, Scott W.....	Waco.
Kirby, A. H.....	Abilene.
Leary, D. T.....	Texarkana.
Levy, Richard B.....	Longview.
Lightfoot, Jewel P.....	Austin.
Lockett, Robert R.....	Texarkana.
Mahaffey, J. Q.....	Texarkana.
McLendon, J. W.....	Austin.

Napier, Walter P.	San Antonio.
O'Neal, Howard F.	Atlanta.
Perkins, Edward G.	Dallas.
Pollard, Claude	Austin.
Powell, Ben	Huntsville.
Robertson, John C.	Dallas.
Robison, J. T.	Daingerfield.
Rodgers, R. W.	Texarkana.
Sexton, R. E.	Marshall.
Smelser, Sam H.	Texarkana.
Spivey, A. N.	Atlanta.
Spivey, Jno. W.	Marlin.
Stinchcomb, T. B.	Longview.
Talbot, J. M.	Dallas.
Terrell, J. M.	Daingerfield.
Thomas, W. S.	Texarkana.
Wagstaff, J. M.	Abilene.
Wheeler, John T.	Galveston.
Wood, Houston	Dallas.

TEXAS BAR ASSOCIATION

CONSTITUTION.

ARTICLE I.

NAME AND OBJECT OF THE ASSOCIATION.

SECTION 1. This Association shall be called the TEXAS BAR ASSOCIATION.

SEC. 2. Its objects shall be to advance the science of jurisprudence, promote the uniformity of legislation in the administration of justice throughout the State, uphold the honor of the profession of the law, and encourage cordial intercourse among its members.

ARTICLE II.

MEMBERSHIP.

SECTION 1. Any attorney of the Texas bar, in honorable standing, upon his written application, may be entitled to membership at any regular meeting of the Association. Said application must be endorsed by three members of the Association, and a fee of \$5.00 shall accompany the same—\$2.50 initiation fee and \$2.50 annual dues.

SEC. 2. Such application shall be referred to the Board of Directors, who shall report the same to the Association, and, if said report be favorable, a ballot shall be taken, and if four-fifths of the members voting shall be in favor of the applicant he shall be declared elected.

ARTICLE III.

OFFICERS AND THEIR DUTIES.

SECTION 1. The officers of the Association shall be a President, a Vice-President, a Secretary and a Treasurer, who shall be chosen by ballot at a regular meeting, by a majority of the members present and voting.

SEC. 2. There shall be a Board of Directors, five in number, elected at the same time and in the same manner with the officers, and the President and Vice-President shall be *ex-officio* members of the Board.

SEC. 3. The officers and Directors shall hold their offices for one year and until their successors shall be elected; provided, that the same person shall not be elected President two years in succession.

SEC. 4. The duties of officers shall be such as usually devolve upon such positions, and may be regulated and prescribed from time to time by the Constitution, By-Laws or resolutions of the Association.

SEC. 5. The Board of Directors shall have exclusive authority, and shall exercise executive supervision over the affairs of the Association between its meetings.

SEC. 6. Vacancies in the offices and Board of Directors shall be filled by the Board, the concurrence of a majority of whom shall be necessary to a choice.

ARTICLE IV.

COMMITTEES.

SECTION 1. The following committees shall be appointed annually by the President for the year ensuing, and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Criminal Law and Criminal Procedure; on Commercial Law; on Publication; on Grievances and Discipline.

SEC. 2. A committee of three, of whom the Secretary shall always be one, shall be appointed by the President at each annual meeting of the Association, whose duty it shall be to report to the next meeting the names of all members who shall in the interval have died, with such notices of them as shall, in the discretion of the committee, be proper.

ARTICLE V.

GENERAL POWERS.

SECTION 1. This Association shall have power to impose fines, assess fees, and establish by-laws for its government. It shall have power to remove officers and suspend or expel members for good cause, upon written charges exhibited against them by a member, and due notice given of the charges and of the time they will be brought before the Association.

SEC. 2. The By-Laws shall prescribe the assessment to be levied on the members for the support of the Association and the promotion of its objects.

ARTICLE VI.

QUORUM.

SECTION 1. Twenty-five members in regular standing shall constitute a quorum for the transaction of business.

ARTICLE VII.

ANNUAL ADDRESS.

SECTION 1. The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

ARTICLE VIII.

MEETINGS.

SECTION 1. A majority of the members present at an annual meeting of this Association shall designate the time and place for holding the next annual meeting.

ARTICLE IX.

AMENDMENTS.

SECTION 1. All propositions to alter, amend or add to this Constitution shall be made in writing at a meeting of the Association and filed with the Secretary at least one month before being acted upon, and shall not be adopted without the concurrence of two-thirds of the members present.

ARTICLE X.

DUES.

SECTION 1. Each member of the Association shall pay to the Secretary the sum of \$2.50 as annual dues.

BY-LAWS.

ARTICLE I.

PRESIDING OFFICERS.

SECTION 1. The President, and in his absence the Vice-President, shall preside at all meetings of the Association; if neither of these officers be present, a President *pro tem.* shall be chosen by and from the attending members.

ARTICLE II.

ADDRESS AND ESSAYS.

SECTION 1. The Board of Directors, at its first meeting after each annual meeting shall select some person to make an address at the next annual meeting, and not exceeding six persons to read papers.

ARTICLE III.

ANNUAL MEETING AND ORDER OF BUSINESS.

SECTION 1. The order of exercises at the annual meeting shall be as follows:

1. Opening address of the President.
2. Nomination and election of members.
3. Report of the Board of Directors.
4. Election of the Board of Directors.
5. Reports of Secretary and Treasurer.
6. Reports of Standing Committees, as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication; on Grievances and Discipline.
7. Reports of special committees.
8. Nomination of officers.
9. Miscellaneous business.
10. Election of officers.
11. The annual address, to be delivered by the person selected by the Board of Directors, shall be made at the morning session of the second day of the annual meeting.

SEC. 2. This order of business may be changed at any meeting by a vote of a majority of the members present; and, except otherwise provided by the Constitution or By-Laws, the usual parliamentary rules and orders will govern the proceedings.

SEC. 3. No person shall speak more than ten minutes at a time, nor more than twice on the same subject.

SEC. 4. A stenographer shall be employed at each annual meeting.

SEC. 5. Each county bar association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association, and such delegates shall be entitled to all the privileges of membership at and during said meeting.

SEC. 6. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the reports of the committees and proceedings of the annual meetings shall be printed, but no

other address made or paper read or presented shall be printed except by order of the Committee on Publication.

SEC. 7. The Board of Directors shall, as soon as parties have been selected to deliver the annual address and read essays, notify the Secretary of this Association of such selections, and of any other matters of especial interest to be brought before the next annual meeting.

SEC. 8. The Secretary shall be and is hereby required to mail each member of the Association, ten days before each annual meeting, a written or printed notice of the time and place of such meeting, giving a statement of the addresses to be delivered, the papers to be read, and other matters of especial interest, and shall also cause such notice to be published.

ARTICLE IV.

MEMBERSHIP AND DUES.

SECTION 1. The initiation fee to entitle a person to membership shall be \$5.00, which shall include the annual dues for the first year.

SEC. 2. The annual dues shall be payable at the annual meeting, in advance, and should any member neglect to pay them for one year at or before the next annual meeting, he shall cease to be a member. The Secretary shall give notice of this By-Law, within sixty days after each meeting, to all members in default.

ARTICLE V.

OFFICERS AND COMMITTEES.

SECTION 1. The terms of office of all officers elected at the annual meeting shall commence at adjournment thereof, except the Board of Directors, whose term of office shall commence immediately upon their election.

SEC. 2. The President shall appoint all committees, except the Committee on Publication, within thirty days after the annual meeting, and shall announce them to the Secretary, who shall promptly give notice to the person appointed. The Committee on Publication shall be appointed on the first day of each meeting.

SEC. 3. The Secretary's and Treasurer's reports shall be examined and audited by the Board of Directors before their presentation to the Association.

SEC. 4. The Board of Directors and all standing committees shall meet on the day preceding each annual meeting, at the place where the same is to be held, at such hours as their respective chairmen shall appoint, and should any member of any committee be absent, the vacancy may be filled by the members of the committees present.

SEC. 5. The Committee on Publication shall meet within one month after each annual meeting at such time and place as the chairman shall appoint.

SEC. 6. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint; reasonable notice shall be given by him to each member by mail.

SEC. 6a. It shall be the duty of the President to use every possible means to ascertain the death of any member of the Association, and, when such death is ascertained, it shall be his duty to seek for a personal friend of the deceased who would be a proper committeeman and to add such friend to the Committee on Deceased Members.

It shall further be the duty of the President to draft bills upon all measures which are unanimously recommended by the Association, and to present such bills to the Legislature for enactment into laws; and the President, in his Annual Address, shall report to the Association how he has fulfilled this obligation.

ARTICLE VI.

SECTION 1. It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; also to scrutinize proposed changes in the law, and, when necessary, report upon the same.

SEC. 2. It shall be the duty of the Committee on Judicial Administration and Remedial Procedure to observe the practical working of the judicial system of the State, and recommend, by written or printed report, from time to time, any changes therein which observation and experience may suggest.

SEC. 3. It shall be the duty of the Committee on Legal Education and Admission to the Bar to report the most suitable means for promoting and facilitating the study of the law, and the necessity or propriety of elevating the standard of qualifications for admission to the bar, and the best means for accomplishing that object.

SEC. 4. It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages.

SEC. 5. The Committee on Publication shall pass upon and have printed all papers, should they deem them of sufficient importance, except as it is otherwise provided by the Constitution and By-Laws.

SEC. 6. The Committee on Grievances and Discipline shall report as to the best means of upholding the honor and dignity of the law in the professional intercourse among the members of the Association. All complaints against any member of this Association shall be presented to this committee, and if the committee shall be of the opinion that the matters

alleged are of sufficient importance, they will determine upon the course of procedure for the trial of the same; and shall give notice to the party charged of the nature of the complaint and the time of the trial thereof by the Association; all of which the complainant shall also be notified by the committee.

ARTICLE VII.

RESOLUTIONS.

SECTION 1. No resolutions complimentary to any officer or member, for any service performed, paper read or address delivered, shall be considered by this Association.

ARTICLE VIII.

AMENDMENTS.

SECTION 1. These By-Laws may be amended at any meeting of the Association by a vote of two-thirds of those present; provided, that a copy of the proposed amendment shall have been filed with the Secretary on or before the first day of such annual meeting.

TEXAS BAR ASSOCIATION.

PRESIDENTS OF THE ASSOCIATION.

Thomas J. Devine, San Antonio, 1882; T. N. Waul, Galveston, 1882-3; J. H. McLeary, San Antonio, 1883-4; B. H. Bassett, Brenham, 1884-5; A. J. Peeler, Austin, 1885-6; T. J. Beall, El Paso, 1886-7; W. L. Crawford, Dallas, 1887-8; F. Charles Hume, Galveston, 1888-9; H. W. Lightfoot, Paris, 1889-90; Norman G. Kittrell, Houston, 1890-1; Seth Shepard, Dallas, 1891-2; John N. Henderson, Bryan, 1892-3; S. C. Padelford, Cleburne, 1893-4; Thomas H. Franklin, San Antonio, 1894-5; William L. Prather, Waco, 1895-6; William H. Clark, Dallas, 1896-7; William Aubrey, San Antonio, 1897-8; Frank C. Dillard, Sherman, 1898-9; Presley K. Ewing, Houston, 1899-1900; M. A. Spoonts, Fort Worth, 1900-01; James B. Stubbs, Galveston, 1901-02; Lewis R. Bryan, Houston, 1902-03; T. S. Reese, Hempstead, 1903-04; H. C. Carter, San Antonio, 1904-05; H. M. Garwood, Houston, 1905-06; A. L. Beaty, Sherman, 1906-07.

ANNUAL ADDRESSES.

1883—Mr. Richard S. Walker, of Austin, "The Bench and Bar in the Early Days of Texas."

1884—Mr. B. H. Bassett, of Brenham, "The Lawyer as a Citizen."

1886—Mr. Sawnie Robertson, of Dallas, "The Death of Chancery."

1887—Mr. C. C. Garrett, of Brenham, "Conflict Between State and Federal Courts as to Jurisdiction of the Former Over Non-residents."

1888—Mr. F. Charles Hume, of Galveston, "Execution Process; Should the Legislature Extend It?"

1889—Mr. S. B. Maxey, of Paris, "The Federal Constitution."

1893—Mr. Thomas H. Franklin, of San Antonio, "Judicial Centralization."

1894—Mr. B. D. Tarlton, of Fort Worth, "Some Reflections on the Relations of Capital and Labor."

1895—Mr. O. M. Roberts, of Austin, "The Right and Duty of Coinage by the United States."

1896—Mr. Seymour D. Thompson, of Missouri, "Government by Lawyers."

1897—Mr. N. W. Finley, of Dallas, "Trusts, Combinations and Conspiracies in Restraint of Trade."

1898—Mr. Sam J. Hunter, of Fort Worth, "Life Tenures of Office in a Republican Government."

1899—Mr. F. Charles Hume, of Galveston, "The Supreme Court of the United States."

1900—Mr. William Wirt Howe, of New Orleans, "Roman and Civil Law in the Three Americas."

1904—Mr. Robert G. Street, of Galveston, "Sovereignty."

1905—Mr. T. J. Brown, of Sherman, "Our State Judiciary."

1906—Justice David J. Brewer, "Two Periods in the History of the Supreme Court."

PAPERS READ.

1883—Mr. A. J. Peeler, of Austin, "Rights of Land Owners in Texas to Protection Against Governmental and Individual Aggression in the Use and Enjoyment of Their Property."

1883—Mr. Robert G. Street, of Galveston, "Texas Pleadings."

1884—Mr. O. M. Roberts, of Austin, "Legal Education and Admission to the Bar."

1889—Mr. O. M. Roberts, of Austin, "Law and Pleading."

1890—Mr. B. H. Bassett, of Dallas, "The Model Brief."

1891—Mr. J. M. Avery, of Dallas, "Liability of an Organizer of a Corporation for Its Acts."

1892—Mr. C. C. Garrett, of Brenham, "Limitation of Actions When There is a Trustee Authorized to Sue."

- 1892—Mr. S. C. Padelford, of Cleburne, "Government."
- 1893—Mr. H. Teichmueller, of La Grange, "The Homestead Law."
- 1893—Mr. T. S. Reese, of Hempstead, "Criminal Law."
- 1893—Mr. John G. Winter, of Waco, "Community Law."
- 1893—Mr. Richard Morgan, of Dallas, "Receiverships."
- 1893—Mr. James C. Scott, of Fort Worth, "Private Corporations."
- 1894—Mr. E. B. Perkins, of Greenville, "The Statutory Craze."
- 1894—Mr. Robert G. Street, of Galveston, "Medical Jurisprudence."
- 1894—Mr. Edwin Hobby, of Houston, "The Legal Profession; Its Value, Importance and Influence."
- 1894—Mr. Charles S. Todd, of Texarkana, "Assignments for the Benefit of Creditors."
- 1894—Mr. Norman G. Kittrell, of Houston, "The Criminal Law of Texas and Its Administration."
- 1894—Mr. T. H. Conner, of Eastland, "Juries and Jury Trials."
- 1894—Mr. T. F. Harwood, of Gonzales, "The Respect Due by Members of the Bar to the Judiciary."
- 1895—Mr. George W. Davis, of Dallas, "Texas Pleadings."
- 1895—Mr. Wm. H. Clark, of Dallas, "Deeds of Trust Preferring Creditors."
- 1895—Mr. John G. Tod, of Houston, "Administration of Community Property by the Survivor."
- 1895—Mr. R. L. Batts, of the University of Texas, "Some Reflections Concerning Legal Education."
- 1896—Mr. E. J. Simkins, of Dallas, "Proper Subjects of Legislation."
- 1896—Mr. F. W. Ball, of Fort Worth, "A Desultory Denunciation of Texas Law and Procedure."
- 1896—Mr. H. Teichmueller, of La Grange, "Judge and Jury."
- 1896—Mr. A. E. Wilkinson, of Denison, "A Review of Some Recent Noteworthy Decisions by the Higher Courts of Texas."
- 1896—Mr. John Dowell, of Austin, "The Symbolism of Commerce—Trade Mark."

1897—Mr. Leroy G. Denman, of San Antonio, "Our Present Judicial System: Its Advantages and Defects."

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1897—Mr. Wm. Aubrey, of San Antonio, "Mob Law."

1897—Mr. B. R. Webb, of Fort Worth, "Some Needed Reforms in Our Real Estate Laws."

1898—Mr. Norman G. Kittrell, of Houston, "Needed Reforms in the Assessment and Collection of Taxes."

1898—Mr. George E. Miller, of Wichita Falls, "Some Features of the Uniform Bankruptcy Law."

1898—Mr. Jonathan Lane, of La Grange, "Our Courts."

1898—Mr. W. A. Kincaid, of Galveston, "In the Known Certainty of the Law is the Safety of All."

1898—Mr. B. R. Webb, of Fort Worth, "A Review of Recent Noteworthy Decisions of the Higher Courts of Texas."

1899—Mr. T. S. Reese, of Houston, "A Plea for Exactness and Certainty of the Law."

1899—Mr. Edward F. Harris, of Galveston, "Some Recent Noteworthy Decisions in Civil Cases by the Higher Courts of Texas."

1899—Mr. W. C. Wear, of Hillsboro, "Admission to the Bar."

1899—Mr. Philip Lindsley, "Humorous Report of Annual Meeting of the Tennessee State Bar Association."

1900—Mr. J. B. Dibrell, of Seguin, "The Legislative Function."

1900—Mr. J. A. Holland, of Orange, "The White Man's Burden, from a Legal Standpoint."

1900—Mr. A. E. Wilkinson, of Austin, "Law and Literature."

1900—Mr. Edwin B. Parker, of Houston, "Anti-Railroad Personal Injury Litigation in Texas."

1901—Mr. John G. Tod, of Houston, "Recent Noteworthy Decisions of the Texas Courts."

1901—Mr. Norman G. Kittrell, of Houston, "The Barker Case."

1902—Mr. Maco Stewart, of Galveston, "The Story of a Land Title."

1902—Mr. John Charles Harris, of Houston, "Trial by Jury in Civil Causes."

1902—Mr. Yancey Lewis, of the University of Texas, "The Rights of Riparian Owners in the Matter of Irrigation."

1903—Mr. Jno. N. Henderson, of Bryan, "The Pardoning Power, Its Uses and Abuses."

1903—Mr. Jno. C. Townes, of Austin, "Courses of Study in Law Pursued in the State University."

1903—Mr. Jno. C. Walker, of Galveston, "Some Peculiarities of the Admiralty Law."

1903—Mr. Wm. D. Williams, of Fort Worth, "The Taxation of Intangibles."

1903—Mr. C. F. Greenwood, of Hillsboro, "Will Injunction Lie to Restrain the Local Option Law from Going Into Effect?"

1903—Mr. S. J. Brooks, of San Antonio, "The Increase of Litigation in Cities and Some Suggested Amendments to the Practice Act."

1904—Mr. Chas. K. Bell, of Fort Worth, "Certain Needed Reforms."

1904—Mr. Edward F. Harris, of Galveston, "Review of Recent Noteworthy Decisions."

1904—Mr. Alfred E. Wilkinson, of Austin, "The Legal Mind."

1904—Mr. A. L. Beaty, of Sherman, "Impeaching the Verdict of the Jury."

1904—Mr. Jno. C. Walker, of Galveston, "The Harter Act."

1904—Mr. W. M. Caldwell, of El Paso, "Growth of Central Power in the United States."

1904—Mr. Clarence H. Miller, of Austin, "Our Lawmakers, the Judges."

1904—Mr. Ocie Speer, of Bowie, "The 'Texas Rule' in Irrigation."

1904—Mr. Thomas Shearon, of Dallas, "The Vendor's Lien in Texas; An Historical Essay."

1904—Mr. Lewis Fisher, of Galveston, "Needed Amendments of Probate Law."

1905—Mr. W. J. Moroney, of Dallas, "How to Reform Our Civil Procedure."

1905—Mr. M. H. Gossett, of Kaufman, "Alien and Corporate Ownership of Land in Texas."

1905—Mr. B. R. Webb, of Fort Worth, "C. O. D. Sales of Intoxicating Liquors."

1905—Mr. Wm. H. Burgess, of El Paso, "A Comparative Study of the Constitution of the United States of Mexico and the United States of America."

1905—Mr. Nelson Phillips, of Dallas, "A Great English Lawyer."

1905—Mr. B. D. Tarlton, of Austin, "The Texas Homestead Exemption."

1905—Mr. Jno. N. Henderson, of Bryan, "The Old Court of Criminal Appeals and Its Work."

1906—Mr. U. M. Rose, of Little Rock, "The Code Napoleon."

1906—Mr. R. G. Street, of Galveston, "Evolution of Law."

1906—Mr. Jordan F. Sellers, of Morrilton, Ark., "Trade Monopolies and Their Legal Restraint."

1906—Mr. Shelden P. Spencer, of St. Louis, "Lawlessness and Lawyers."

1906—Mr. Lewis Rhoton, of Little Rock, Ark., "The Law of Bribery."

1906—Mr. T. W. Gregory, of Austin, "The Origin and Growth of the Ku Klux Klan."

1906—Mr. Sam B. Dabney, of Houston, "A Criticism of the Organization of Our Courts and a Theory for Their Reorganization."

1906—Mr. Wm. B. Smith, of Little Rock, Ark., "Bills of Lading as Collateral Security."

APPENDIX.

PRESIDENT'S ANNUAL ADDRESS

DELIVERED BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

MR. JOSEPH M. STAYTON,

OF NEWPORT, ARKANSAS,
PRESIDENT OF THE ARKANSAS BAR ASSOCIATION.

Gentlemen of the Bar Association:

The subject of "Compensation to Injured Workingmen" is one of so much importance to the profession, that it is thought it would be of interest to you to prepare a paper, not so much to express the views of the writer or as a vehicle for original thought as to discuss with you the state of our law upon the subject and compare it with the efforts at a solution of the question made by other nations.

As a rule, our profession has been slow to recognize conditions demanding a change in the laws, or to adapt itself to entirely new conditions; and this is well illustrated in the law governing the relations of the master and the servant. Suits for damages founded upon personal injuries are of comparatively modern origin, and practically the same rules are applied at this time as were when the liability of the master was first recognized.

Before the days of Watt the laborer had few risks to run; metals were worked in small shops; corn and wheat were ground in water-driven mills; cloth was woven in the homes of the peasantry; ships were built in small yards, and shoes were made by the cobbler and his apprentice. Then workmen either performed their

labor singly or in small groups, where each could watch his fellow, and the reckless or the careless were quickly detected and discharged, and the consequent risk of an accident was small; but, with the advent of steam, conditions were entirely changed and a thousand dangers crept in where one existed before. Now, instead of relying upon himself, he is at the mercy of many others, of whose faithfulness and carefulness he has no opportunity to judge and, by reason of his position, is unable to see. It not infrequently happens that his life and limb are entirely at the mercy of another's care.

When injured at these machines his claim for compensation is met with the reply, "You assumed the risk"; and, when his fellow servant neglects to use towards him proper care, he is told, "This is another risk you have assumed and you can recover nothing." The doctrine that the master is not liable for injuries sustained by the servant as a result of the servant's negligence, or the negligence of his fellow workman, with perhaps some modification, is just and sound in principle; but, on the other hand, the result to the employe is oftentimes severe.

It will be found that more attention has been paid to the rights of the master than to those of the servant, and, although all kinds of safeguards have been provided to protect the servant in the faithful discharge of his duties, there are many instances which deny him a remedy when the accident arises neither from a reckless disregard of his duties or from a failure to exercise proper care.

The object of the law in this regard is to provide protection for the master and for the employe; the rights of the one should not be safeguarded more than the other; and while the liability of the master should not be unjustly extended, the employe ought not to be deprived of the right to receive compensation for an injury for which he is not personally responsible, either directly or for the failure to exercise due care.

The duty devolves upon the master to employ careful, competent and experienced workmen, and he is only held to the exercise of ordinary care in their selection; if this has been done by him, the employe who is injured by the negligence of one of those selected by the master assumes the risk of this negligence, presumably because he is in a position to judge of the competency and carefulness of his co-employes, and will refuse to work with them if they are reckless or incompetent. That, after the master has performed this duty devolving upon him under the law, he should be absolved from liability, there can be no question, because, in no sense, is he an insurer; but, on the other hand, it will be as

readily admitted that the servant should have some remedy for an injury which was not the result of his carelessness or negligence.

That there was injustice in the strict application of the old rule in this regard is manifest by the state of the law at this time, and, for the purpose of this paper, it will be of interest to see what has been done to further protect the servant in this country; for, while the doctrine of assumed risk remains practically the same, an exception to the rule is made in the case of fellow servants, and this exception has undergone many changes and many devices have been framed to benefit the servant, but, at the same time, to deal justly with the master.

In respect to employees engaged in the use and operation of railway trains, cars, etc., the States of Florida, Georgia, Iowa, Kansas, Missouri, Minnesota, North Carolina, North Dakota, Maryland, Texas and Wisconsin have abolished the fellow servant rule; it has been modified in Mississippi, when the injury results from the negligence of a fellow servant engaged in another department of labor, or one engaged on another train of cars, or employed about a different piece of work; and so in South Carolina, where it is extended to employees engaged in the service of street railways; and, generally, statutes providing that co-service is not a bar to an action for injuries caused by the negligence of an employe in a different department, or grade, have been enacted in Arkansas, Indiana, Massachusetts, Missouri, Montana, Ohio, Oregon, South Carolina, Texas, Utah and Virginia, mostly applying to railway service.

In a great many States relief for the harshness of this rule has been found in making vice-principals of all those employees who are intrusted with the power of superintendence, control or command of other employees, or with authority to direct any other employe in the performance of any duties of such employment. Twenty-eight States hold employers liable for injuries to employees by reason of the failure to comply with specific provisions of laws, condition of ways, machinery, appliances, plants, etc., or other statutory regulations designed for the protection of employees. Nearly all have enacted laws changing, either wholly or in part, the common law rule that no action for damages for the killing of a human being can be maintained.

Recently Congress passed a bill which, in regard to railways engaged in interstate commerce, does away with the fellow servant rule altogether and introduces the rule of comparative negligence where the injury is the result of contributory negligence. This is, practically, all that has been done. An apparent solution of this question has been found and settled by a number of foreign

countries, and it will be of benefit to see what has been done by them in that regard.

So far as ascertained, the doctrine of assumed risk, within which the negligence of the fellow servant is included, obtained formerly in Belgium, Italy, England, France and Germany, but in each of these countries measures have been enacted into laws providing for compensation for all injuries received in the course of employment, regardless of the nature and cause of the injury, and the master is allowed to exempt himself from all liability, the provision being made compulsory. It will be impossible, within the limits of this address, to go into the details of these laws, so only their substance will be given.

In Belgium one injured at work, who sought compensation from his employer, had first to prove that his employer was at fault. To render the employer liable for an injury, whether committed intentionally or through negligence, there must have been a breach of duty. The employer escaped all liability by proving that he had not failed in his legal duty, or that he had been prevented from performing it by accident. In order to remedy this, a Compensation Act was passed in 1895. The principle of this act is compulsory compensation for all workmen engaged in certain enterprises, such as mining, manufactories, railways and, generally, where steam and electricity is used as a motive power, where the injury happens in the course of the employment. The compensation includes a pecuniary indemnity, representing a part of the wages paid, as well as the expense incurred the first six months for medical attendance, etc. As a rule, it is granted in the form of a life annuity where there is a permanent disability, and a temporary annuity where the disability is not permanent. If the injury is partial, the indemnity he receives is 50 per cent of the difference between what he received before the accident and what he can earn before complete recovery; if permanent, the annual allowance is 50 per cent of his wages, determined according to the degree of the injury. Heads of establishments are made individually liable, but they may transfer the liability to insurance companies or relief associations. Willful injuries by the employer are not covered.

In Italy, workmen in mining, excavating, railways and in industries operated by steam and electricity, must be insured against accidents to life, limb and health, by the employer and at his expense. For a permanent partial disability an indemnity equal to five times the amount of the probable loss of wages may be claimed, and for a temporary, but absolute, injury half daily wages lost are allowed, beginning five days after the injury. A temporary partial injury entitles the servant to half of the daily loss

of wages after the fifth day. For death, a payment of five years' salary to the heirs or legal representatives, within three months, is provided for. The head of the industry offending must stand the expense of medical care at the time of the injury. Reviews may be had if there was error in determining the extent of the injury, or new developments caused by the injury appear. Industries may escape the provisions of the act by providing for indemnity, under proper guarantees, where the employment exceeds 500 workmen. There remains a criminal responsibility of the master if the accident happened through the negligence of the person to whom the care of the business had been intrusted.

In England, the common law liability of the master for injuries to the servant is as follows: The master is responsible to his servant for the consequences of injury caused by his personal negligence, if judgment can be obtained against him during the lifetime of the person injured; but the master is not responsible to relatives or personal representatives. The master is absolved from responsibility for the negligence of those to whom he delegates the duty of management and control of his business, and for the negligence of a fellow workman of the workman injured. He can be freed from responsibility by showing that the injured workman assumed the risk of his duty, or by showing that the injured workman was himself guilty of contributory negligence.

Various acts have been passed for the benefit of workmen, the first of which was Lord Campbell's Act. This extended the liability for injury where death had not ensued, to actions where the death was caused by "the wrongful act, neglect or default" of the employer, and provided that such actions should be for the benefit of the wife, husband, parent or child, of the person whose death was so caused; and in every such action the jury was authorized to award such damages as they thought proportionate to the resulting injury, confining the damages to actual pecuniary loss to the respective parties for whose benefit the action was brought.

Subsequently was passed the Employer's Liability Act of 1891. The common law doctrine of "common employment" and "fellow servant" were swept away and the master is held responsible where injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery or plant; but only if such defect arose, or had not been discovered or remedied, because of the master's negligence or that of the person to whom he had intrusted the duty of seeing that such instrumentalities were in proper condition; or where the negligence is that of a workman to whom the master has intrusted power of superintendence or control; or where the injury is caused by an act or omission of any

person in the course of his employment, done in obedience to the master's rules or by-laws, or the particular instructions of any person to whom authority has been delegated by the master; or where the negligence is that of any person in the service of the employer who has charge of the signals, the locomotive, or the train upon a railway. The compensation is restricted and does not exceed such sum as may be equivalent to the estimated earnings during a period of three years preceding the injury, or the earnings of a person in the same grade of employment for a like period in the district in which the workman is employed at the time of the injury.

Following this was the Workmen's Compensation Act of 1897, based upon a different theory. The common law and the previous statutes were based upon the theory of contract. This act made the master the insurer of the safety of his employes and imposed upon him a liability irrespective of any breach of duty on his part or on the part of his servants. It applies only in and about railways, factories, mines, quarries, engineering works, and in and about any building exceeding thirty feet in height, being constructed or being repaired by means of scaffolding, or being demolished, or where machinery is being used for such purpose. This has since been extended to agricultural occupations. It fixes the liability of the employer as follows: If the injury results in death, dependent persons, who would be entitled to sue under Lord Campbell's Act, may claim a sum equal to three years' wages, calculated upon the earnings of deceased for the year preceding the injury; in the case of partial dependents, such a sum as is reasonable and proportionate to the injury, not exceeding three years' wages, to be settled by arbitration, if not agreed upon; where there are no dependents, reasonable expense of medical attendance and burial, not exceeding \$50; where there is a total or partial disability, a weekly payment during incapacity, not exceeding 50 per cent of weekly average wages and not exceeding \$5 weekly. Regard is had to the power of earning wages after injury and any payments already made. If his injury is attributable to willful misconduct, no compensation or indemnity is allowed. The employer may be exempt if any other scheme of compensation or indemnity is arranged which is equal to the provisions of the act. Under the law, the workmen has still his common law right of action.

In France, the Code provides, generally, that every act or omission which causes injury to another gives rise to a cause of action, and is extended to include liability for injuries caused by dependents, minors, pupils, apprentices, servants and animals. The statute of 1898, as amended in 1905, gives to workmen engaged

in factories, manufacturing, boat building, loading and unloading, and in every kind of work in which are made or handled explosives, or in which is used any machine moved by power other than that of man or animals, an indemnity at the expense of the employer, provided that the interruption of work is continued for more than four days; for an absolute and permanent disability an employe receives an annuity equal to two-thirds of his annual salary, and for a partial and permanent disability, an annuity equal to half the reduction which the accident has occasioned to his annual salary. For temporary disability, if it has lasted for more than four days, he receives a daily indemnity equal to half the salary earned at the time of the accident, unless the income was variable, and in the latter case the daily indemnity is equal to one-half the average earnings on working days during the month preceding the injury.

When a workman dies as the result of injuries, his family may receive indemnity. The surviving consort is entitled to 20 per cent of the annual salary, and where his children are orphans as to one parent only, they receive not more than 40 per cent of the annual salary; orphans as to both parents are given not more than 60 per cent of the annual salary. Relatives, where there is no wife or legitimate children, may recover not more than 30 per cent, payable in fixed proportions to the ascendants for life; to descendants until they become 16 years of age. The annuities mentioned are payable quarterly and may not be seized or assigned. The employer must pay the medical and funeral expenses—the latter not over \$20.

Possibly the most elaborate system of relief for sick, disabled and injured workmen is provided by the German insurance laws.

This system is divided into three parts—the sick, the accident and the old age and invalidity insurance. Although each one of these parts is based on different laws, together they constitute a unified system and supplement each other.

The sick insurance includes practically all workingmen employed for wages in commerce, industry and the handicraft trades. Such servants are required to be insured, regardless of the amount of their wages; and to secure the enrollment of individuals to whom this law applies the employers are required to send to the proper insurance fund the name of each person who enters or leaves their service, upon pain of a fine and liability for any sick relief incurred. Eight forms of different organizations affording relief under this law are now in active operation. The most important of these are the local sick funds. They are independent corporations and, as a rule, are established for persons in one or more industries in a given locality, such as masons, weavers, etc.,

or for all employes of a given type of industry, such as factory employes. The most numerous funds are those known as establishment sick funds; each of these includes the employes of but one establishment, and if the industry is classified among the dangerous trades the employer is required to institute a separate fund for his establishment. The other organizations are known as building trades sick funds, guild sick funds, miners provident funds, registered auxiliary funds, and parish sick funds, the last participated in by persons not insured in any of the other funds. While the benefits vary, the following is the minimum: Free medical attendance, medicines and medical supplies of the smaller sort, from the first day of sickness; a sick benefit equal to one-half of the wage rate is used in calculating his dues. It begins the third day after disability and continues for twenty-six days. Hospitals are provided where, at his option, the workman may be treated; in the event of death, there is a funeral benefit equal to twenty times the amount of his daily wages paid to his heirs. The income of sick funds is derived from the dues of members and the amount of dues is fixed by each fund, but may not exceed from 3 per cent to $4\frac{1}{2}$ per cent of the member's wages. Provision is made for a possible increase to 6 per cent. The employer pays two-thirds of the dues and the employe one-third; the share of the employe is deducted from his wages and remitted by the employer.

The accident insurance includes all workingmen engaged in agriculture, forestry, transportation by land and water, and sea and coast fisheries. All workingmen and technical experts earning less than \$714 per annum are required to be insured. This insurance is administered by associations of employers, known as Mutual Trades associations, and includes all employers engaged in one industry, such as brewers, chemical industries, etc. In other cases associations exist for certain districts, such as the Wool Industries Association of Saxony. All of them have Federal supervision. There are now sixty-six Industrial and forty-eight Agricultural associations. In case of accident the benefits described above are paid by the sick benefit fund for thirteen weeks of disability; from the beginning of the fifth week to the end of the thirteenth week the sick fund increases the amount of its benefits from one-half to two-thirds of the earnings. A pension is paid during the continuance of the disability, whether partial or complete. In complete disability the pension is equal to two-thirds of the earnings of the injured person, proportioned to the degree of disability. In cases of death, a funeral benefit not less than \$11.90 is provided, and also a pension to the dependents of the deceased, beginning with the day of death. The widow and each

child receive 20 per cent of the earnings of the deceased, though the sum of these pensions may not exceed 60 per cent of such earnings. If the widow remarries, she receives three times the amount of her annual pension as a marriage portion. The children's pension is paid until they reach 15 years of age. The workmen's share of the expense of accident insurance consists of the benefits paid out of the sick insurance fund during the first thirteen weeks of disability, otherwise all expenses are defrayed by the Employers' Association. The income of the association is secured by an annual assessment on each employer for his share of the association expense during the preceding year; his share is determined from the amount of his payroll and the danger rate of the occupation or industry. Each accident may be investigated, and special courts are provided to settle disputes. There is also an old age and invalidity insurance administered now by fifty corporations; they provide an invalidity pension, an old age pension, repayment of dues, free medical treatment and miscellaneous assistance. The invalidity pension is paid, without regard to age, to those persons whose earning capacity has been permanently reduced to less than one-third, and whose state of disability has lasted for twenty-six weeks and longer. The pension, or annuity, consists of two parts: An annual subsidy of \$11.90 paid by the Empire and added to each pension granted by the institutes, and the pension granted by the institutes, which is calculated in the following manner: Members are divided into five classes on the basis of the wages received. Each class pays a different rate of dues and receives benefits in proportion. In calculating the pension, each wage class receives a certain amount, called the initial sum, which is increased for each payment of weekly dues. The lowest pension is \$27.70; after paying dues for fifty years the pensions range from \$44.13 to \$107.10. The old age pension is paid without regard to earning capacity, when the workman reaches his 70th year; they must have paid dues for a waiting time of 1200 weeks before they are eligible, but provision is made for those who reach 70 years of age before the law has been in operation for that time.

One-half dues may be returned: To females who marry and have been mothers for 200 weeks; to permanently disabled persons who receive a pension from the accident insurance; to the heirs of a mother who dies before receiving a pension and who has paid dues for 200 weeks.

The active co-operation and services of both the employer and the workman is had in the administration of the insurance, and its soundness is secured by holding the employer, the guilds

and the parishes responsible for any deficit in the various forms of sick insurance organizations. The National, State and local governments guarantee the payment of claims against the accident and invalidity insurance organizations. It is estimated that the amount paid by the employer for accident insurance is 3 per cent of the wages; for sick insurance 1 per cent, and for invalidity insurance $1\frac{1}{2}$ per cent, making a total of $5\frac{1}{2}$ per cent of the wages added to the cost of production.

Laws providing for compensation, generally, to injured workmen have been enacted in Denmark in 1899, in Spain in 1900, and in Holland. The results of these laws have been found to be entirely satisfactory. The burden has been cheerfully borne by the employer and he has not tried to shift it to the employe by a reduction of wages, nor has it materially increased the cost of production. Although, as has been noted, the common law liability remains in England, there has been a marked decrease there in the number of personal injury suits by injured workmen. Although these laws have been in operation for a length of time sufficient to prove their success and practicability, it is rather singular to find in the United States we have not only failed to appreciate what they have accomplished, but the majority of the States have practically prohibited such relief by making it impossible to inaugurate it. Arkansas, Florida, Colorado, Iowa, Maryland, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Texas, Virginia, Wisconsin and Wyoming prohibit the restricting the limitation of liability by contract. Ohio prohibits railroad companies from compelling employes to take out insurance; Michigan, Iowa, Montana and South Carolina provide that contracts for insurance relief in case of injury or death do not constitute a bar, or defense, to an action for injury. In the bill which recently passed Congress, mentioned above, it is provided that no contract of employment, insurance, relief benefit or indemnity for injury or death, nor receipt of such, would bar recovery, but that a set-off would be allowed to the extent of such sums as had been paid. In Massachusetts and New York, employers who contribute to an insurance fund may plead, as a set-off and in mitigation of damages, the amount secured to the employe; and Massachusetts recognizes voluntary relief associations organized under the approval of the Railway Commissioners. In Indiana, the employer who has provided associations for relief may contract for release of liability.

An interesting experiment was tried in Maryland, which was the first of the States to enact a law modeled upon the European laws, providing for compensation to injured workmen. This act

extended the liability of certain classes of employers to cases where employes were injured by the negligence of a fellow servant, and to cases where the injured employe negligently contributed to his own injury. Its main features were, however, the establishment of an insurance fund to be paid into the hands of the State Insurance Commissioner and administered by him. Employers in certain lines, among which were steam and electric railways, might be exempt from liability under existing laws by making annual payments in monthly installments; the amount varied with the industry—the rate was \$3 for each steam railway employe; \$1.80 for each miner, and 60 cents for each electric railway employe; the employer could be exempt if a better system had been provided. In case of death, \$1000 was to be paid to the heirs. The law was declared unconstitutional on account of the powers conferred in the Commissioner. But nine companies availed themselves of the benefits of the act; the law was in operation two years, and five death losses were paid. The entire expense of administration was only \$300, about 6 per cent of the amount paid in. The statutory rate of 5 cents per month for street railway employes, 25 cents a month for steam railway employes and 15 cents for miners, maintained the fund in the face of the various benefit payments. Of the amounts distributed, \$3000 was paid to the heirs of employes of the United Railways and Electric Company, the largest contributor. These payments practically offset the amount paid in by the company, and it reported that it made the entire payment out of its own funds and made no deductions in the wages of the employes, as under the law it might have done to the extent of one-half of the payments. In only one of the three cases was there liability on the part of the company. There seems to have been no effort made to revive it.

In advance of action by statute, and conceding the necessity of providing for relief, quite a number of railway systems—notably, the Pennsylvania, the Baltimore and Ohio, the Atlantic Coast Line, the Chicago and Eastern Illinois, the Chicago and Alton, the Illinois Central, and others, in various forms—have provided plans for voluntary relief by which pensions for old age, sick benefits, accident insurance and benefits to heirs in case of death, are paid. This relief is provided for by assessments made upon each employe, and in nearly all of the associations the company bears its part of the funds necessary to make up any deficits; and an examination of the rates charged for this will show that it is the cheapest form of insurance, and that it is so imperceptibly paid the employe does not miss it or feel it a burden.

In some of the systems the companies carry the risk with insur-

ance companies, but the Chicago and Alton has a system of its own. This company advances the premium for the employe and deducts it from his wages, as follows: For officemen, stationmen, passenger conductors, towermen and flagmen, one-half of 1 per cent of their monthly wages; for freight trainmen and switchmen, 2 per cent of their monthly wages, and for all other employes, 1 per cent of their monthly wages. The benefits for an accidental injury, not resulting in death, are equal to half the employe's wages for a period not exceeding a total cost of \$1000; and in case of death, one-half the usual wages for a year to the widow and next of kin, together with the funeral and medical expense, not, however, to exceed a total sum of \$1000. The company makes up all the deficits if the premiums fall short of maintenance. Nearly all the railway companies have hospital service for the sick and injured employes, maintained by small assessments upon each employe, and the deficiency in maintenance is made up by the companies.

As has been shown, instead of fostering and encouraging this idea of compensation for injured workmen, the majority of States actually either prohibit it altogether or refuse to leave a way open for its advancement, and, regardless of the care taken by the employer for the welfare of the employe, or however so well he may seek to provide for him, the law prohibits him from contracting against liability, and, as a consequence, the employer is forced to let the employe look after his own protection. While, it is true, there are all sorts of insurance contracts obtainable in this country, varying much in the cost of premiums, yet there is no compulsory insurance imposed upon the master, and the average employe does not receive sufficient wages to provide for his family and invest in either life or accident insurance.

If the results of the experiments tried in Germany, England and other foreign countries have shown that the laws providing for compensation to injured workmen have proven to be a success, that the employer and employe can bear the burden of maintaining the systems provided, and that it adds no material expense to the cost of production, it is hard to understand why a compulsory insurance law can not be made effective here. More especially is this true when we realize the employers in industries of moment in this country are now protecting themselves against liability for their negligence by transferring the risk to insurance companies organized for that purpose, the expense of which is entirely borne by the employers. It certainly can not be contended that the additional expense would impose any great hardship upon the employers, or add materially to the cost of production.

By far the greatest proportion of the litigation which is con-

gesting our courts is suits for damages for personal injuries, and injuries to employes are no small part of these suits. In the great industries of our country there are millions of men, women and children employed, and while the ratio of injuries has not been obtained, the number of injuries to railway employes will well illustrate it. For the year ending June 30, 1904, there were 1,295,121 employes on their pay rolls. For that year 5410 were killed and 16,753 were injured. The ratio of casualties indicate that one employe in 239 was killed and one employe in every seventy-seven was injured.

It is true that in no sense is ours a paternal government, and it is against our principles to attempt to legislate people into habits of economy and protection for their families, yet these people constitute a large part of our citizenship and are entitled, by this fact and by reason of their honesty, industry and intelligence, to share the benefit of the full protection of the laws, and it should be given to them without stint and to the fullest measure. The protection of life and the pursuit of happiness are constitutional guarantees, and, so long as laws are enacted and administered along these lines, it can, in no sense, be construed as paternal legislation. It is our proud boast that here the condition of the workingman is the best in the world, and, as applied to skilled labor, that is probably true; but, as to the common laborer, facts are developing every day that show us a state of affairs that is appalling. So long as they are employed and have health, their lot is bearable, but in the face of misfortune they inevitably succumb. That the employer should care for his sick employes, or furnish means by which they can be safely and effectively treated, and provide for those who, after a long period of faithful service, are unable to work, can not be questioned. This is a subject that must concern us all; for when disaster comes to them in the shape of an injury which deprives them of their ability to work, or after they have worn themselves out by hard labor, unless such means are provided for taking care of them, the public in general must provide for their support. The charity of our people is boundless, and when they are brought face to face with the true conditions of the unskilled workingman's lot some change is going to be made to better it. The labor organizations have been knocking at the doors of our Legislatures for a long time asking for relief, and soon their requests will grow into demands that will require immediate attention.

Whether the subject is viewed from the point of self-interest or by the public generally as humanitarians, it must be confessed, some relief is necessary, and the surest, safest and best method,

as shown by the experience of other countries, is to provide for compulsory compensation and insurance, the expense of which should be borne by the employer in fair proportion, and by the employe according to the benefits conferred upon him.

The temptation to depart from the original purpose of this paper has been exceedingly strong, but the members of the bar have always been the foremost among the leaders of reform. They need only a hint to call forth an investigation, and it is hoped that each will look into this question for himself. It is quite sure, when the subject has been fully weighed, they will lend their active and hearty support to the enactment of such legislation.

PRESIDENT'S ANNUAL ADDRESS
DELIVERED BEFORE THE
ARKANSAS AND
TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

HON. H. M. GARWOOD,

**OF HOUSTON, TEXAS,
PRESIDENT OF THE TEXAS BAR ASSOCIATION.**

Gentlemen of the Texas Bar Association:

Our Constitution provides that your President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

Since the last meeting of the Association there has been but little legislative activity; the work of the Special Session of the Twenty-ninth Legislature being confined to the correction of Section 120 of Chapter 11 of the Acts of the First Called Session of the Twenty-ninth Legislature, commonly referred to as the Terrell Election Law. This section, as pointed out in the address of my predecessor, contained provisions, evidently the result of mistake or misadventure. It has been so amended as to provide that a candidate for any county office who has received either a plurality or a majority of the primary votes, shall receive the nomination, as shall have been determined by the county committee; and that candidates for all State and district offices should, in the nominating convention, have prorated among them the convention vote of each county in proportion to the vote cast for each candidate in the primary election in each county; and that in district and State conventions, at the end of each ballot cast, the candidate receiving the smallest vote shall be dropped from the list of candidates to be voted for on the next ballot. The amended section

further provides that whenever the name of any candidate is withdrawn or dropped from the convention, that the delegation of each county may cast the instructed vote, or any part thereof, of such county, for such dropped or withdrawn candidate, for any other candidate whose name is then before the convention, as the delegation may decide.

While it is not altogether clear whether it was the intention of the Legislature, in the event any portion of the vote of a county had been cast for a candidate whose name had been dropped under this rule, that the delegates, as individuals, should be instructed to cast such vote, or whether a majority of the entire delegation would be entitled to cast the same, it is probable that the expression, "the delegation of each county may cast the instructed vote, or any part thereof, of such county, for such dropped or withdrawn candidate," should be construed to mean that, as to such vote, the unit rule will prevail and the majority will have the right to cast the same.

Without pausing here to discuss the underlying political philosophy of that theory which demands that the popular majority, as contra-distinguished from the representative majority, ought or ought not to govern in a representative, as distinguished from a pure democracy, attention is here drawn to the fact that under this bill it is clearly possible to nominate for State and district offices candidates who do not represent a majority of the popular vote.

A discussion of the multifarious provisions of this law would consume more than the time allotted to this brief address, and the necessity therefor has been indeed obviated by the very useful and timely pamphlet issued by Mr. Claude Pollard of the Attorney General's office. Suffice it to say, that the law as a whole seems to be based upon a deep-seated distrust of the honesty of the voter, and so complex and minute are its provisions that, unless it is speedily simplified, the average voter will require expert legal advice before he goes forth to cast his ballot. Already there is growing up a separate department of the law as complicated and as uninviting to the average practitioner as the local option and public land laws of our State. One instance will serve to illustrate the point here made.

A certain candidate for a county office applied to the county committee to have his name placed upon the official ballot. To this request the committee declined to accede upon the ground that the candidate was not a Democrat. An injunction was applied for by petition to a local district judge. This being denied, the petitioner obtained the same from the district judge of an adjoining district, filing the papers in a different court in the

county where the injunction was first applied for, the judge of which in the meantime had left, leaving the defendant committee without an opportunity to move to dissolve. Thus situated, they braved punishment for contempt, and set at naught the order of the court. This left the petitioner without relief, the judge being absent and no commitment for contempt being obtainable. Thereupon a special judge for the district was elected, and he promptly proceeded, upon affidavits filed, to impose punishment for disobedience of the order. The committee thereupon sued out habeas corpus before a third district judge, who discharged the defendants, and the proceedings came to an end, the election being shortly held. This complicated situation thus illustrates the possibilities of this law.

While the purity of the ballot should be guarded and every effort made to see that the popular will, whether expressed in a numerical or a representative majority, shall not be thwarted, it is gravely to be doubted whether laws of this complicated character will permanently conduce to that end, and whether primary elections might not more logically be conducted by party government than by legislative act.

In this connection attention is called to the Act of February 24, 1905, which confers upon the Supreme Court, or any of the justices thereof, the power, either in term time or vacation, to issue writs of habeas corpus in all cases where any person is restrained in his liberty by virtue of any order, process or commitment issued by any court or judge on account of the violation of any order, judgment or decree rendered or entered by such court or judge in any civil cause, with power, pending hearing, upon application, to admit to bail.

While it is believed that every trial court should have broad powers to enforce its orders and maintain its dignity, there ought not in our system of government to be any place for a wrong for which there is not a prompt and effective remedy.

While the sphere of legislative action has been thus limited, the courts have been more than usually active, and many most inviting decisions have been rendered in cases involving the validity of various statutes.

The Act of April 19, 1905, authorizing the State or any citizen thereof to enjoin the habitual use, actual, contemplated or threatened, of any premises, for the purpose of illegal gaming, was attacked in *Ex Parte Allison*, 90 S. W. Rep., 870, upon the ground that it denied the right of trial by jury, permitted double punishment, and therefore jeopardy, and denied due process of law, in that it extended the use of the writ of injunction to fields un-

known to the common law. The Supreme Court, through the Chief Justice, in rendering the decision, overruled all of these contentions and sustained the act. There can be, of course, no question as to the correctness of the decision. It is of interest, however, to note that this is a new use of the writ of injunction and may perhaps furnish an additional argument to those accustomed to discuss those theories of the law sometimes referred to as government by injunction.

In *Beavers v. Goodwin*, 90 S. W. Rep., 930, Justice Spears held that Article 402 of the Penal Code of 1895, as amended by the Act of March 16, 1903, providing that upon complaint of any person who believes that intoxicating liquor is being sold or given away in violation of law, and upon the issuance of a warrant, a sheriff or constable is authorized to search the premises and seize all intoxicating liquors therein contained, there being no provision in the law for the disposition of the property so seized, was unconstitutional as depriving the owner of his property without due process of law. Laws of this character, plainly disregarding the fundamental principles of private right, always thwart the intention of their makers and suggest the inquiry: Is devotion to old ideals of government being weakened? Have we less reverence for written constitutions? Are we, as a people, abandoning the theory of individualism and relying more and more upon the powerful aid of government to correct those evils which are best left to individual action?

In *Anderson v. Ash*, 14 Texas Ct. Rep., 637, the statute authorizing the appointment of county auditors, approved April 22, 1905, in counties having a city therein with a population of 25,000 or over, a most salutary act, was held valid.

One of the most useful among the very many useful acts passed by the Twenty-ninth Legislature, was that authorizing the commissioners court of the several counties to create and establish drainage districts. (See Chap. 110, p. 212, Acts Twenty-ninth Legislature.) This law would have afforded a much needed relief to many large sections in different portions of the State, but especially in South Texas, and it is greatly to be regretted that, as held by the legal department of the State government, by reason of the fact that no provision is made by the act for the election of drainage district trustees, nor any procedure by which the commissioners court might be required to discharge the duties of such trustees, it was wholly inoperative.

The Supreme Court, in *Borden v. Rice and Irrigation Co.*, 12 Texas Ct. Rep., 437, having held that the irrigation statutes conferred the power of eminent domain, this act permitting the

formation of drainage districts would have acted as the complement to our laws upon the subject of irrigation and would have done much to give an impetus to agriculture in a large section of our State.

Section 35 of Article I of the Constitution, providing that no bill, except general appropriation bills, shall contain more than one subject, which shall be expressed in its title, received construction by the Supreme Court, in *I. & G. N. R. R. Co. v. Railroad Commission*, 14 Texas Ct. Rep., 42, and by the Court of Civil Appeals for the Third District, in *G., C. & S. F. R. R. Co. v. Stokes*, 14 Texas Ct. Rep., 356; in the first of which it was held that the subject of abuses, not being mentioned in the caption of the act creating the Railroad Commission, it was without power to correct any abuses save such as could be construed to affect freight and passenger tariffs, power to regulate which was mentioned in the title of the act; the second case holding that the title to the act to prohibit railway companies from permitting Johnson grass or Russian thistles from going to seed upon their rights of way, and fixing the penalty, did not include the subject of damages, and, therefore, so much of the act as authorized a recovery for damages was void. These decisions indicate the intention of our courts to hold the Legislature to a strict compliance with this provision of the Constitution.

By the decision in *Ex Parte Massey*, 92 S. W. Rep., 1086, the Act of April 18, 1905, regulating and placing certain restrictions upon shipment and transportation of intoxicating liquors into any other county, justice precinct, district, city or town, where the sale of intoxicating liquor has been prohibited under the laws of this State, was declared invalid as violative of the interstate commerce clause of the Federal Constitution and of the Wilson Act regulating interstate commerce. A majority of the court, speaking through Davidson, Chief Justice, says:

"Again, the law is violative of the Federal Constitution and the Wilson Act of Congress regulating interstate commerce. The act in question makes no exception in favor of interstate commerce shipments or contracts. It punishes alike, whether the solicitation is for State or interstate shipments. That it is violative of the Federal laws can not be questioned in the face of one hundred years of decisions by the courts, Federal and State."

Upon the same ground, to wit, that of interference with interstate commerce, the Act of April 17, 1905, imposing a tax of 1 per cent upon the gross receipts of transportation companies, received from both intra and interstate commerce, was held invalid by the Court of Civil Appeals for the Third District, in *Railway*

v. Davidson, 15 Texas Ct. Rep., 274. The court, in a lengthy and interesting opinion, reviewing all the authorities, holds that the tax is levied directly on receipts from interstate commerce; that the State has no right or power to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on commerce and amounts to a regulation of it, which belongs solely to Congress. Inasmuch as the Supreme Court has granted a writ of error in this case, it is not thought proper to further discuss the same.

What is popularly known as the Intangible Assets Act, creating a State tax board for ascertaining the intangible values of certain corporations and businesses, has also been attacked in the district court of Travis county upon two main grounds: First, that the act violates the local assessment clauses of the State Constitution; and, second, that it denies the corporations included the equal protection of the law, in that it does not include other corporations and businesses possessing like intangible values; the argument upon this latter proposition proceeding upon the lines indicated in the criticism of the bill made in the able address of my predecessor, Mr. Carter. The district court of Travis county, however, upheld the bill and it is now pending upon appeal before the Court of Civil Appeals for the Third District.

In connection with the subject of interstate commerce, it will be of interest to note that the Supreme Court of the United States, in the case of Railroad Company v. Mayes, on writ of error from the Court of Civil Appeals for the Third District of Texas, has held that Articles 4497 to 5000 of the Revised Statutes of this State, which impose penalties for failure to furnish cars after written demand therefor, can have no application to interstate shipments, as being so applied a regulation of interstate commerce. While there are expressions in the opinion which would indicate the fact that the statute imposed heavy penalties for trivial violations of its provision, where no damages could have actually resulted to the shippers, renders the statute in question an arbitrary exercise of the legislative power; still, the gist of the decision is that, applied to interstate shipments, it amounts to a regulation of interstate commerce not within the power of the State.

This decision and others that might be quoted ought to make clear the proposition that State Legislatures are wholly without power to regulate or place any restriction upon interstate commerce, and to suggest to the legislative department the necessity

of relieving the courts from the burden of declaring such statutes inoperative.

As stated by Senator Culberson in his masterly argument on the Rate Bill: "When, therefore, the subject of proposed legislation is commerce, and, moreover, is commerce with foreign nations or among the several States, the authority to regulate it is exclusively and completely in Congress. * * * It is sufficient to declare as the truth of history, that the imperative necessity to provide a general authority for the regulation of foreign and interstate commerce aroused the country, that this was the dominating motive for calling the convention; that, although the convention was composed of men of different political schools, and although many plans of constitution were submitted, all of them contemplated conferring this power upon the Federal government, and that the grant of the power to Congress to regulate foreign and interstate commerce is exclusive and complete."

The Act of April 17, 1905, being Chapter 133 of the General Laws of the Twenty-ninth Legislature, has been declared invalid by at least one of the district judges of the State, upon the ground that, being penal in its nature, it is not sufficiently definite to meet the requirements of Article 6 of the Penal Code, which requires that whenever any provision of the penal law is so indefinite in form or of such doubtful construction that it can not be understood, either from the language in which it is expressed or from some other written law of the State, such penal laws shall be regarded as wholly inoperative.

The Act of April 18, 1905, providing that it shall be unlawful to issue any ticket, check or writing obligatory to any servant for labor performed, payable in goods or merchandise, and making such act a misdemeanor punishable by fine or imprisonment or both, is an extension of the police power of the State into the domain of private contract, which ought not to be defensible on principle and would appear to be a clear denial of the liberty of contract. Nevertheless, a very similar statute has been sustained by the Supreme Court of Tennessee, the decision of which was affirmed by the Supreme Court of the United States in *Knoxville Iron Co. v. Harbison*, 183 U. S., 13. Similar statutes have also been sustained by the Supreme Court of West Virginia in *State v. Coal Co.*, 13 W. Va., 802, and the Supreme Court of Indiana in *Hancock v. Gaden*, 121 Ind., 366. In the face of these decisions, we would hesitate to attack the law upon the ground that it deprived the citizen of any right guaranteed by the Federal Constitution.

While it would thus appear that numerous acts of the Twenty-

ninth Legislature have become inoperative for inherent defects, or by reason of conflict with constitutional provisions, no adverse criticism can properly be implied upon that legislative body. It will compare favorably with any of its predecessors, and has placed upon the statute books many wise, just and beneficial laws. If there are defects, they result as the logical and necessary effect of our legislative system, and not from lack of capacity upon the part of our legislators. Practically limited by our Constitution to a sixty days session, it is wholly impossible within that time to legislate with due consideration for the varied interests of a State as extensive as ours. It should not be forgotten that no State in the Union embraces within its territories sections and interests so diverse or a system of government so complex. As a people we do not appreciate the magnitude of the work which necessarily devolves upon our legislators, and I do not hesitate to declare that to properly discharge those duties requires an ability fully as great as should be demanded from a member of the American Congress or British Parliament. To state that within sixty days any body of men can properly formulate and properly construct the appropriation bill, the tax laws, laws conserving our vast and varied special funds, and at the same time enact those proper police regulations demanded by a rapidly expanding civilization, is to state the impossible. Many remedies have been suggested with the immediate view of perfecting the written laws as they are enacted, as, for instance, the establishment of a standing committee or board of revisers, which shall pass upon and place in proper legal shape all laws prior to their final enactment. This and like remedies have never commended themselves to my mind. The constitutional amendment submitted to be voted upon at the ensuing election is a step in the right direction. The number of the legislators should not be decreased. We have an imperial domain and it should be dealt with in an imperial way, and the popular will should be perfectly reflected in the legislative body, steps being taken, however, to provide proper compensation in order that, if necessary, the Legislature may remain in session from month to month until its work is made as perfect as deliberate thought can render it.

The adjournment of the present Congress marks an epoch in Federal legislation. The recent disclosures with reference to improper practice of insurance companies, the ownership of stock in coal companies by railway officials, and the criminal and wholly indefensible practice of rebating, from which happily our own internal commerce is now wholly exempt, awakened just public indignation and greatly stimulated the demand for the regulation

by Congress of internal commerce in all its forms. It was generally expected by the public that the regulation of insurance would be undertaken. It was properly held, however, that insurance was not commerce and that Congress was without jurisdiction in the premises. It is greatly to be hoped that the public mind shall not become so prejudiced by these disclosures as to induce upon the part of our own legislators the passage of laws unduly encouraging the formation of home companies with slender capital, and imposing upon the great companies now in existence burdens unduly severe.

The Pure Food Inspection law is a wise exercise of the Federal police power, and will redound both to the welfare of the general public and of the interests immediately affected thereby. It was urged that these interests should pay the expenses of the inspection, but the fear that such a provision would endanger the entire measure induced its elimination. Our own Pure Food law, passed by the Twenty-ninth Legislature, contains similar provisions, and it is apprehended that under the authority of *Railway v. Gibbs*, 142 U. S., 395, holding that railway companies could be compelled to pay the expenses of railroad commissioners, and similar cases, such provisions could be sustained as a valid exercise of the police power of the State.

The Territorial Government is at best an anomaly in the American system, and the incorporation of each new State is generally greeted with popular approval. Oklahoma and the Indian Territory, already filled with an energetic and thrifty population, will soon assume a prominent place in the sisterhood of States, and it is greatly to be hoped that the day is not far distant when the national flag will float over no territory that does not enjoy the dignity of statehood and the privilege of self-government.

The creation of branches of the Federal courts for the Southern and Western districts of the State at Victoria and Del Rio, while perhaps not absolutely demanded by the necessities of litigation, will yet be received with favor by the people and bar, tends to bring both into closer touch with the Federal judiciary and complete the removal of that prejudice against the Federal courts, which has now happily almost, if not entirely, passed away.

An act of more than ordinary interest was that approved June 11, 1906, relating to liability of common carriers engaged in interstate and international commerce to their employees. This bill provides that every common carrier engaged in interstate or international commerce shall be liable to any of its employees, or, in case of death, to his personal representative, for the benefit of his widow and children, if any; if none, then for his parents, and

if there be no parents, for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employes or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

It is further provided that the contributory negligence of the employe, being slight, and the negligence of the employer being gross in comparison, such contributory negligence should not bar a recovery, but the damages should be diminished by the jury in proportion to the amount of the negligence attributable to such employe, all questions of negligence and contributory negligence to be for the jury.

It is further provided that no contract of employment, insurance relief, benefit or indemnity for injury or death, entered into by or on behalf of any employe, should constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe, provided, however, that any common carrier defendant might set off any sum it has contributed toward such insurance relief or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative. A limitation of one year is provided for actions brought under the bill. This act of Congress is revolutionary in more than one sense. It overthrows the practically universal rule of contributory negligence and establishes that of comparative negligence. This, however, is done in such vague and ambiguous language that it will be more than difficult to understand just what is intended. It is provided that where the employe has been guilty of contributory negligence, and this negligence was slight and that of the employer gross in comparison, his contributory negligence shall not be a bar, and that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. It is fair to infer from this language that if the negligence of the employer is not gross, or when the negligence of the employe is something more than slight, then his contributory negligence will be a bar. Of course, if this is left to a jury it will always be determined that the negligence of the employer is gross and that that of the employe is slight.

While the last sentence of Section 2 is as follows: "All questions of negligence and contributory negligence shall be for the jury," it occurs to the writer that it ought to be a question for the court to determine whether the ordinary rules of contributory negligence apply or whether the facts are such as to demand the application of the rule of comparative negligence established by the act. It becomes an extremely serious question as to how far this act ap-

plies to cars and trains moving within the State. By its terms it applies to every common carrier engaged in interstate commerce. Every railway in the State of Texas is engaged in interstate commerce. Suppose a train moves from Houston as an initial point to Denison as a terminal over the Houston and Texas Central railroad, which does not extend beyond Denison. While this company is unquestionably engaged in interstate commerce, this movement is wholly intrastate. Suppose an operative upon this train is injured. By the literal terms of this act his case would come within the purview of the law. Such a construction, however, would be revolutionary in this that it certainly would constitute a direct invasion by the Federal authority of the domain of the State police power. Suppose, however, in this train there is one car of interstate freight. Does this constitute the entire train an interstate train and justify the application of the provisions of the act? If it does, the fact that there is a single interstate shipment on a train, whether in a carload or not, would also justify the application of the provisions of the act. If this be true, then there is little left for State jurisdiction. It has been entirely absorbed by Congress. This theory would seem to be justified by the construction hitherto placed upon the Safety Appliance Act of March 2, 1893, as amended by the Acts of 1896 and 1903. If it shall ultimately be held that the fact that a train of cars moving between points within the State becomes subject to Federal jurisdiction by virtue of the fact that it contains a single car or a single shipment of interstate freight, so that the Federal Congress has jurisdiction to determine what rules of law shall apply as to the rights and duties of master and servant, no reason can be suggested why it may not go still further and occupy the whole field hitherto supposed to be exclusively within the power of the State. Already it has been held that in matters of interstate commerce each case must be decided by its own especial facts, and there can be no doubt but that the extension of the Federal power in matters of interstate commerce is further and further circumscribing the field of State jurisdiction, and it is a matter of special note that these exertions of the Federal power are, as a rule, heartily endorsed by representatives of that section that is supposed to hold extreme views with reference to the power of the State as distinguished from that of the Federal Government.

Interest, however, in Federal legislation centers in the Rate Bill, conferring upon the Interstate Commerce Commission power to regulate interstate railroad rates and otherwise amending and improving the interstate commerce act, the arguments whereon, especially in the Senate, recalled the best traditions of that, the

greatest deliberative body in the world. In that high debate, which assumed at times a color almost exclusively technical, it is with pardonable professional pride that we note the brilliant arguments of the two great lawyers who represent Texas in that body. While the power of Congress to regulate transportation rates was challenged as well as the right to delegate that right to a subordinate agency, the weight of the argument is the other way, and it may safely be assumed that the power will be sustained. There seems to be a general impression that the bill as finally passed was void of force. This is a great mistake. While the power to promulgate rates generally is not conferred, provision is made that when complaint is lodged against a specific rate the Commission shall have power to prescribe a just and reasonable rate to be thereafter observed by the parties as a maximum rate. The Commission is given power to fix and apportion joint rates when the parties can not agree, and to require a uniform system of accounting for all interstate carriers, including express, sleeping car and pipe line companies, subject to the act. The right to issue free transportation is limited to employes, and the provisions of the old law with reference to rebates and discriminations are made more effective; and in furtherance of this end, a carrier is forbidden to transport any article or commodity except lumber in which it may have a proprietary interest except the same be necessary or intended for its own use. Disobedience of the orders of the Commission is punishable by severe penalties, and provision is made to compel obedience by mandatory orders of the Circuit Court; all orders of the Commission being declared, *prima facie*, just and reasonable, and to be obeyed until set aside in direct proceedings brought for that purpose. The issuance of preliminary restraining orders and writs is very carefully guarded; it being required that five days' notice shall in all cases be given before such order shall be issued, and that an appeal may be had from interlocutory orders of this nature directly to the Supreme Court. It was with reference to the issuance of these preliminary writs that the most interesting debate of the session occurred. It had been a matter of general and more or less unfounded complaint, that, by the issuance of preliminary injunctions and restraining orders, the enforcement of Commission schedules was restrained in advance of final hearing where it might be determined that the enjoined rate was not illegal, the carrier in the meantime earning the difference between the prior rate and that which had been enjoined. It was proposed to deny to the courts the right to issue any preliminary writ or restraining order and to compel obedience to the Commission rates until, upon final hearing, they had been declared to be unreasonable.

The evil sought to be remedied by this drastic provision could be easily met, and is, as a matter of practice, often met, in proper cases by requiring from the complainant a bond payable to all shippers, conditioned that the carrier, in case the rate should finally be held illegal, should repay to each shipper the difference between the Commission rate and that charged. If a rate is too low, it is confiscatory. If the Constitution forbids the taking of private property for public use without just compensation, confiscation for a single moment is as objectionable as a permanent taking for public use without compensation. A law denying such preliminary relief could only be sustained, if at all, by a provision that in the event the rate sought to be enjoined should be finally held illegal, that then the Government should refund to the carrier the difference between the rate established by the Commission and that sought to be charged. The discussion, however, was upon the power of Congress to deny to the courts the right to issue temporary writs rather than upon the abstract justice of such denial.

Mr. Bailey contended that the Constitution, having provided that the judicial power of the United States shall be vested in our Supreme Court and in such inferior courts as Congress may from time to time prescribe, that the power to create and the power to destroy must, in the nature of things, include the power to limit and control, and that, inasmuch as the inferior courts were created and their jurisdiction defined by Congress, it logically followed that Congress must have the power to limit and control the process which they might issue. This construction was supported with a force of reasoning difficult to resist, however much we may dissent from the conclusion reached.

In reply, Senator Spooner drew a clear distinction between *jurisdiction* and *judicial power*, contending that when Congress had created these inferior courts and defined their jurisdiction, they became, under the Constitution, invested with the whole judicial power; that when the Constitution declared that the judicial power shall extend to all cases in law and in equity arising under the Constitution, the full power to hear, determine and decide equitable controversies in accordance with the equity practice was conferred by the Constitution upon the courts, and that for Congress to determine that in certain cases a litigant must suffer temporary confiscation and is not entitled to the usual equitable relief to prevent a threatened wrong, is for Congress to usurp a judicial function and to deprive the courts of that judicial power conferred upon them by the Constitution.

Mr. Culberson thus admirably summed up the argument:

"By the Constitution the judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress may establish; and the judicial power of the United States extends, among others, to all cases in law and equity arising under the Constitution. It is within the power of Congress to abolish all courts inferior to the Supreme Court, or to take from them jurisdiction of cases arising under the Constitution. But so long as they have jurisdiction of such cases, as now, the exercise of the judicial power to determine, in a proper case, whether rates have been established in violation of the Constitution can not, I think, be limited, abridged or denied by statute. If the courts are authorized, as is conceded, to enjoin the operation of confiscatory rates by final decree, to deny them authority to do so previous to this, although jurisdiction has attached, would, in effect, limit the exercise of the judicial power which springs from the Constitution. Jurisdiction is conferred in this instance by statute; but the judicial power arises primarily from the Constitution. Under the Constitution, persons may no more be deprived temporarily of their property, without due process of law, or for public use without just compensation, than they may be deprived of it permanently."

This view is so obviously in consonance with the spirit of the Constitution that it is not surprising that it should have gained credence, and it is reflected in the bill as it now stands. Ample protection, however, is made for the rights of the public by the provisions for notice, as above mentioned, and for immediate appeal to the Supreme Court of the United States from interlocutory orders. The bill as a whole is a good one, and it is believed that it will be received by the great transportation companies of the United States in a frank and friendly spirit. The Railroad Commission, State and Federal, may become the instrumentality of great and permanent good, both to the public and to the carriers, when their great powers are wielded by men who use them for the public good, with due regard for private right and with an adequate conception of the grave and delicate character of the problems submitted to them for solution. It is true that grave questions confront the legislative and judicial departments of the government. It is too often true that corporate wealth and power becomes insolent in its disregard of individual right as well as of the public good; but these questions are no more difficult than those that have confronted us at every stage of our history. They will be solved, not by conjuring up new and strange theories, either of law or of government, but by the sure and steady application of those principles which at every crisis have sufficed to save the commonwealth. No problem confronts the American people that is

not susceptible of easy solution under our Constitution and existing laws. That system which from the chaos of the Revolution brought forth a compact and perfect government; which has survived the shock of four great wars; which amid the wreck and ruin of civil convulsion preserved the autonomy of the States, the personal security of the citizen, the rights of private property, and every great guarantee of Anglo-Saxon liberty and civilization, can not be threatened or even disturbed by any condition which now confronts us. While the power of aggregate wealth is great, it is as nothing compared to the aggregate intelligence of this people. Our laws are sound; our public men are not corrupt; our judiciary is not weakened. The same law that regulates the grist mill can control the common carrier, State and interstate. The same law that struck down the common law conspiracy in restraint of trade, when intelligently applied, will control the modern trust. It is not necessary that private property shall be confiscated, that the liberty of contract be taken away, or that any right guaranteed by the Constitution, State or Federal, be infringed in even the slightest degree. To the contrary, these principles will be as the cloud by day and the pillar of fire by night, leading us from the desert of civic and industrial despondency.

While all this is true, and the lawyer, strong in the faith which he has in the essential strength of that great system of constitutional law and judicial machinery, which is the very breath of his life, laughs to scorn the hysterical antics of the politician, and is always apt to be an optimistic patriot, still it is even possible to shock his conservatism. These shocks are usually administered by the courts. Such an one was that recently delivered by the Supreme Court of the United States in the case of *Haddock v. Haddock*, in which it was held that a judgment for divorce obtained in Connecticut by a bona fide citizen and inhabitant of that State, by service by publication upon a citizen of New York, was not entitled to full faith and credit in the latter State, although in the former it may be properly enforced and recognized as a valid judgment. It is difficult to follow the reasoning of this case. If the action is *in rem*, as hitherto generally supposed, the judgment must be valid everywhere. If the action is *in personam*, it can not be good anywhere, the defendant not being within the jurisdiction at the time of service. Yet the court holds that the judgment may be entirely valid where rendered, and valid nowhere else. The possible consequences of this decision are most grave. The citizen may be married in one State, and unmarried in another, both conditions being legal. Children may be legitimate in one State and illegitimate in another. The divorce legally obtained in one State

may subject the plaintiff, if he remarries, to prosecution in another State for bigamy, and property rights brought into inextricable confusion. The dissent was very strong, the decision being rendered by a vote of five to four. In this connection, however, it may be said that the writer does not share in that criticism of the Supreme Court which is based upon its numerous dissenting opinions. To the contrary, it is an indication that every member of the court is bringing to the solution of every case the full power of his independent judgment. It shows that there are really nine members of the court and that no one intellect or set of intellects is dominating its decisions. The court which presents no showing of dissent is reaching the dangerous level of mediocrity, or else is dominated by a few master minds.

Another decision of the Supreme Court which will be received with surprise by the profession is that of *Security Mutual Life Ins. Co. v. Pruett, Ins. Co. of State of Ky.*, 26 Sup. Ct. Rep., 619, where it is held that a State may provide by its legislature, that if a foreign insurance company shall remove to a Federal court a case which has been commenced in a State court, the license of such company to do business within the State shall thereupon be revoked. While this case is the logical development of *Waters Pierce Oil Co. v. Texas*, 177 U. S., 28, and is in line with *Home Ins. Co. v. Morse*, 20 Wallace, 445, and *Doyle v. Continental Ins. Co.*, 94 U. S., 535, it was generally supposed that the two last cases had been practically overruled by *Baron v. Burnside*, 121 U. S., 186, and *S. P. Co. v. Denton*, 146 U. S., 202. The Supreme Court of this State certainly took that view of the decisions, as shown by its decision in *Texas Land and Mortgage Co. v. Worsham*, 76 Texas, 556, where it held that the law of 1887 requiring foreign corporations to obtain a permit to transact business in the State, and making the right to the permit depend upon the surrender by such foreign corporation of the right secured to it by the Constitution and laws of the United States, to remove a cause brought against it to the Federal court, was invalid. Whether this decision shall stand or no, it is regrettable that any State should evince such prejudice against the Federal tribunals as to induce it to make the very natural attempt of a foreign company to litigate in a tribunal removed as far as possible from local interests a cause of forfeiture of corporate right. These decisions proceed upon the theory that because the State can absolutely forbid the entrance into its jurisdiction of a foreign corporation, that it has the right to impose conditions upon such entrance of any kind, even though they be conditions unconstitutional in their character. The same logic would apply to domestic corporations, and the State could

make it a condition precedent to the obtaining of the charter for a private corporation that no suit should be brought by said private corporation in a Federal court, although a Federal right had been violated; that no writ of error should be prosecuted from a decision of the court of last resort in the State to the Supreme Court of the United States, although the Federal law or the Federal right had been overridden, and the assertion in the Federal courts of these rights could be made a ground for dissolution of the domestic corporation. While it can hardly be conceived that a State Government could proceed to such lengths, still the logic of this decision unquestionably permits such legislation.

As modern society develops, and the business and personal relations of our people become closer and more complex, the necessity for uniform law regulating business and social relations becomes apparent. The limited jurisdiction of the Federal Government is wholly inadequate. Concerted action upon the part of the States is necessary, and that can only be obtained by the action of bodies such as these. When we recall the great work of David Dudley Field, the general adoption of uniform laws with reference to bills and notes, in fact an interstate commercial code, divorce, extradition, insurance and other subjects, would appear matters of no great difficulty. As prophetic of that much-desired end is this harmonious meeting between the representatives of two sovereign States, the presence of distinguished guests from a third, and the participation in our deliberations of a member of that, the greatest judicial tribunal which history has ever known, symbolizing, as it were, the perfect unity of the States and the perfect harmony of the two jurisdictions, each within its own sphere, all-powerful and supreme.

It has often been said that the legal profession is in process of degeneration; that it has become commercialized; that its ideals have declined. It is true that there are those among us that prostitute it to low ends and use it solely for its gains; but they are few. The greater number follow it as a high and honorable calling, affording opportunity for the noblest exertion of which the human intellect is capable, giving to it the devotion of the artist to his art, the devotee to his faith.

At no period in its history has it given promise of a higher development. The bar of these United States stands today with the judiciary the guardians of our national life, an impassable barrier against the aggressions of wealth and power upon the one hand and the encroachment of socialism upon the other. Its sphere of influence grows with the evolution of the American system. Not only is every business community of this vast territory

in touch with every other, but it is abreast of the activities of the world. War has become a thing of the past. The battles of the future will be fought in the cabinet and before the great international tribunals. The completion of the interoceanic canal, the establishment of the Monroe Doctrine as a part of the law of nations should of necessity bring to us as clients the Republics of the Western Hemisphere. Not Cicero before the Senate pleading the cause of Sicily, nor Burke that of India before Parliament, could boast such a theater for the exercise of his talents, as will those great advocates and jurisconsults who, in the immediate future, will marshal the histories of nations and plead the cause of the weak and the oppressed at the bar of civilization, the high courts of international arbitration. For exercise in that great arena the American lawyer has special qualifications. The conflict of State with State, the conflict of State and Federal jurisdiction, the study of written constitutions, debate in public assembly, all these, to him, render the problems of international law easy of solution, while to its study he will bring higher ideals, both of private and of public right, than his European brother, whose past is shadowed by the treaties, traditions and diplomacies of the centuries.

Neither the science of the law nor our profession as exponents thereof has retrograded. To the contrary, it has developed *pari passu* with an expanding national life, and in that higher civilization to which we are rapidly advancing it will be, as it has been in the past, the strength of the State, the pride of the commonwealth and the ornament of society.

THE CODE NAPOLEON.

ADDRESS DELIVERED BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

HON. U. M. ROSE,
OF LITTLE ROCK, ARKANSAS.

In the year 1904 the bench and bar of France celebrated the centennial anniversary of the adoption of the Code Napoleon with appropriate ceremonies, similar to those of our observance of the life and services of Chief Justice Marshall in this country in the year 1901. As a lasting memorial of the celebration in the United States, various addresses delivered in different cities were compiled under the supervision of Hon. John F. Dillon, accompanied by an introduction from the pen of that eminent jurist.

Similarly in France the more permanent outcome of the centennial observance remains embodied in two ponderous volumes devoted to the French Code known through the world as the Code Napoleon. These volumes are made up of carefully prepared papers, forty in number contributed principally by professors of prominent law schools in France, and by German, Belgian, Italian, Dutch, Swiss, Roumanian and Canadian jurists, together with papers by professors of law schools in Egypt and in the Grand Duchy of Luxemburg, and by the President of the Council of State of Monaco, preceded by an introduction by Albert Sorel, member of the French Academy and of the Academy of Moral and Political Science; the whole forming a work of vast erudition, treating of the Code from various points of view, evincing a profound research into the very fundamentals of jurisprudence. These distinguished writers are either French or residents and representatives of countries that have adopted the Code Napoleon, or of countries whose jurisprudence is mainly based upon

it, with the single exception of Professor Crome, of the University of Bonn, who discourses concerning the analogy that exists between the German civil code and that of France.

Notwithstanding this formidable list of contributors, unity of purpose is a conspicuous feature of the work; treating, as it does, successively of general views, studies of particular topics, of the influence of the Code beyond the boundaries of France, of its connection with the preceding system of laws in that country, and with the laws of ancient Rome; producing thus a consistent though composite whole, interesting and instructive to all persons that care for matters of that kind; especially for the bar and the bench of France, and of those countries whose laws have been materially modified by this celebrated Code, which, having girdled the earth and survived the storms and revolutions of more than a century, still remains one of the vital forces of civilization.

Even for us who live under laws not derived from the Code Napoleon, these critical and luminous essays may well claim more than a passing notice. It has so happened that both in France and in this country, by a gradual system of absorption, the ancient Roman civil law has become a most important element in jurisprudence. But there are other causes that have tended to produce uniformity. The ancient customary laws of Germany were planted both in France and in England, and French laws and French institutions were grafted in the common law of England by the Norman conquest; moreover, modern legislation in all civilized countries is largely based on ethical principles which are of universal application. Seas that no longer divide facilitate commercial, literary and social intercourse. For some centuries every new discovery or invention possessing any positive value becomes at once a part of the accumulated treasures of all nations and all peoples. No countries using different forms of speech have been more intimately connected than France and England. Always rivals, studious of the institutions, policy, motives, strength and weakness of each other, even their frequent wars have tended to break down detachment and isolation. Montesquieu, Voltaire and Rousseau set the example of studying English laws and institutions on the spot, and rendered these studies fashionable in their own country. One of the principal results of the French Revolution was the rebuilding of the government after English models. The reciprocal borrowings of these two great nations in the arts, literature and law are beyond computation. In later times, we in America have borrowed largely from both, and, in their turn, they have borrowed from us. All of these processes have tended to uniformity, with the general result that the laws and institutions of these peoples

are in many essentials similar to an extent that could hardly have been expected.

It follows that in the two memorial volumes that I have mentioned, dedicated to the study and analysis of the Code Napoleon, many subjects are treated that are as familiar to the American as to the French bar; subjects containing matter enough to furnish forth any number of interesting and instructive papers; but it is not my present purpose to attempt to sound the depths of this vast sea of learning, hardly suited to an ephemeral address designed to fill an interval of professional life. Hence, I shall, with your permission, confine my attention to a matter purely preliminary; and shall devote the time allotted to me to the lighter and humbler task of showing how the Code Napoleon came into existence, and to saying something of its general effect in the sphere of rational jurisprudence.

I am entirely aware that my presentation of this subject may tax your indulgence as being somewhat desultory; but I am of opinion that it is not absolutely indispensable that our talks on occasions such as the present shall always be faultlessly academic. If on this point I am in error—as may well happen—it is consoling to reflect that even errors are often instructive; and that the leniency of the bar as to speeches and addresses has rarely been found wanting.

It is no doubt well known to you that the Code Napoleon superseded such a tangled complication of laws as has never existed in any other country, and which it would take volumes to describe. You have all heard of the saying of Voltaire that one traveling through France changed laws oftener than horses; a saying that was hardly an exaggeration, but was rather a terse representation of a very complex fact.

It may be remarked in a general way that up to the time of Napoleon France was governed mostly by customary laws having their origin in a very remote past. Of course, the ancient Gauls were governed by unwritten and customary laws, as were the colonies of Burgundians, Visigoths, Normans and Franks, planted in France at different periods, bringing with them severally the customs that had prevailed in the localities of their origin at the different periods of their emigration.

It was estimated that in the 10th century there were 360 kinds or groups of customary laws, including an equal number of lines of descent. Sometimes a custom prevailed throughout the whole of a province; at others it was confined to a town, a city, or to some small locality. If, as the years wore on, some of these customs became obsolete, it often happened that new ones came into

existence. When, in the trial of a cause in the provinces, no controlling rule could be found, recourse was had to the more copious customs of Paris, just as the English courts in like cases had resort to the boundless quarries of the civil law.

In 1505, during the reign of Louis XIII., a commission was created for the purpose of reducing all these customs to writing; but this compilation was not intended to be exclusive, as the ordinance provided that customs inadvertently omitted might be established in any locality by a vote of persons having a knowledge of such matters.

In 1461, in the reign of Louis IX., and extending to the time of Louis XVI., royal ordinances were published relating to commerce, to procedure, to officials, to registry of legal documents, to foreign judgments, to the criminal law, and so on; but these did not affect the existing local customs; or, if so, only to a trivial extent. In short, the law remained in a state of the greatest disorder and anarchy. Of course, some of the customs more generally prevailing were wise and useful; and hence the revised text of the customs of Paris of 1580 was used in the preparation of the Code Napoleon.

Besides the enormous multiplicity of customs, the feudal law was of wide application, having an extremely complex and intricate system of its own; and the ecclesiastical courts, governed by the canon law, had an extensive jurisdiction, and insisted on one that was almost universal. Anything like a proper or intelligent administration of justice under such perplexing conditions was manifestly an impossibility.

It might be asked why the king, the sole lawmaker, did not introduce some order into this universal chaos. The answer is simple enough. The ideal of the period was military glory. If the king could secure plenty of soldiers, with money enough to keep them in the field, and to supply all his other real and imaginary wants, his duty to his people was discharged. But there was another reason. His was a paternal government, and the people—regarded then as but little better than the beasts of the field—did not want any change. They clung to their local customs with a measure of infatuation almost incomprehensible in our day. The lawgivers of ancient times, when the breath of material progress hardly stirred the stagnant waters of social life, formulated codes that were declared to be unchangeable. Such provisions were a kind of *Magna Charta* for the common people, who, at a time when no distinction was recognized between prospective and retrospective laws, looked upon legal changes with apprehension and dismay.

On the whole, we need not be much surprised at the long con-

tinuance of the discordant customary laws of France, since they were sanctioned by antiquity, and their very diversity and confusion discouraged efforts at reformation. The people at large were not in search of novelties in those days, and were disposed rather to bear the ills they had than to fly to those that they knew not of. Even in America, where changes are often made without much reflection, we may perceive a remnant of the distrust of innovation that was once universal. Our system of coinage is immensely more convenient than that of England; and yet, after its adoption, men for a whole generation stubbornly continued to keep their accounts in pounds, shillings and pence. Although it is conceded that our system of weights and measures has nothing but custom to recommend it, and that our orthography is antiquated and barbarous, yet reformers along these lines at present find their progress slow and discouraging.

It seems much easier to change the written law than it is to change the unwritten law. For centuries our method of trial by jury has remained substantially unchanged, and the number and quality of the trial jurors is sacramental. If we have a case of complicated accounts which two or three expert accountants could speedily unravel, we must get a jury from the country knowing no more about bookkeeping than they know about Greek, and everything must be explained to them by experts, whose testimony they do not understand.

As to unanimity in making up a verdict, that is a question too sacred for discussion. In written laws we can tell where the shoe pinches, but unwritten laws are too mysterious for the finite mind. They are so like disembodied spirits that we feel it safer not to fool with them. When the great body of laws was unwritten, this feeling was more intense. Thus, when the barons met at Merton in 1236, and it was proposed to enact a law providing that the marriage of a father and mother should have the effect to legitimize their children previously born—a law to which no reasonable objection could be made—they answered as one man that they would not change the laws of England.

If the French laws were in a deplorable condition, the administration of justice was even worse. From the time of Francis I. down to the Revolution, judgeships were sold at public auction to the highest bidder. It is true that under this system there were to be found a few famous judges of great ability and learning and of much nobility of character, but their names can be counted on the fingers of one hand; and there is abundant evidence to show that the rank and file of the judges were men of a low order, sometimes in

point of intellect, at other times in respect of morals, and, frequently, in both.

Parties to suits universally procured letters from their friends and others, addressed to the judges, imploring a favorable decision, and private interviews with the judges for similar objects, being commonly solicited, were freely granted. Parasites and hangers-on about the court secured or augmented their revenues by peddling their recommendations to litigants.

For two days in the week in all the higher courts an office was kept open for the reception of presents from litigants to the judges. The respective values of the gifts were not supposed to have any effect on the judicial mind; but litigants were not accustomed to think so, and attractive and costly gifts were no doubt accepted with corresponding feelings of gratitude. "Evil to him who evil thinks," was the motto of the day. It was a blasphemous crime to question the integrity of one of the King's judges, though he owed his ermine solely to the length of his purse.

It may be mentioned, in passing, that it was this practice of the French judges of receiving gifts that led to the downfall and disgrace of Lord Bacon; a shining example of retributive justice that did more to preserve the integrity of the bench in England than all the statutes ever enacted. Bacon was very familiar with affairs in France, where his brother Anthony lived the greater part of his life, and became the friend of Montaigne, and a boon companion of the courtiers of Henry of Navarre. Lord Bacon, on account of his foolish fondness for pomp and display, was incessantly harassed by creditors; and so, in an evil hour, he sought to eke out his already ample revenues by adopting the French fashion of receiving gifts. When charged with his crimes, he excused himself by saying that the gifts that he had received had never perverted his judgments. That was French also, but his defense was promptly ruled out of court.

We lawyers are often amused by the technicalities of the English common law procedure in civil causes; but these were mild and inoffensive as compared with those that prevailed in the French courts, technicalities that greatly impeded the administration of justice, and rendered it extremely costly.

The system of proceedings in the criminal courts was the worst that human ignorance and malignity have ever invented. Except in the ancient city of Toulouse, the Spanish Inquisition never obtained any hold in France; but by the ordinance of Frances I., the methods of the Inquisition were applied in all criminal causes. The defendant was denied the benefit of counsel, the trial was in secret, and he was subjected to torture before trial, during trial

and after trial. Women, children and men in feeble health were exposed to the most dreadful sufferings before any testimony was adduced; and frequently they died under the first ordeal. If a victim escaped, it often happened that he was maimed for life.

This ordinance, which remained in force until the reign of Louis XVI., was procured and prepared by Amos Poyet, whose career so much resembles that of Bacon. He was not so great a man as Bacon, but he was equally unprincipled. Having filled many high positions, he was made chancellor, thus obtaining the highest civil office in the gift of the Crown; and during his incumbency he was guilty of notorious acts of corruption and oppression, for which he was brought to trial. On his arraignment, he asked that he might be defended by counsel. Being confronted by his own Draconian ordinance, he said that when he drew it up "he did not expect ever to be charged with a criminal offense." It was of this ordinance that the President de Harlay said that if he was accused of stealing the towers of the cathedral of Notre Dame, he would begin by running away.

Poyet was condemned to pay a heavy fine to the King, and was deprived of his office. The King was displeased with the mildness of the punishment, saying: "When I was young, if a chancellor lost his office he also lost his head." After this sentence Poyet, like Bacon, lived for some years, shunned by all who knew him. Curiously enough, Bacon also expressed his belief in the efficacy of judicial torture. The ordinance of Poyet was only repealed on the eve of the Revolution.

Education of the common people was, of course, undreamed of in those days. One-fifth of all lands in the realm belonged to the clergy, and most of the rest of it belonged to the nobility. The exemption from taxes of these two wealthy classes caused the heavy burden of taxation—the result of useless wars and wanton extravagance—to fall on the common people and the middle classes with crushing weight, so that the general and chronic distress and misery throughout the country were indescribable. La Rochefoucault tells us that in his time the French peasantry, less than half clad, starving in miserable kennels, had lost even the semblance of humanity; and their condition in later years became even worse.

After many centuries of misrule and oppression in France at last came the day of general reckoning and house cleaning, the day of an awakened and angry people, determined to inaugurate a new era.

The Revolution began in anarchy; but anarchy can not last long, since the mob must have a leader, and the leader of a mob represents a well-known form of government. Then there followed an

oligarchy; and later, in a brief space, the monarchy was re-established; for at the time of which I speak the government had become highly concentrated; Robespierre had become King, and Rousseau was his prophet.

Voltaire and the encyclopedists doubtless hastened the step of the Revolution; but the Revolution itself was dominated by Rousseau. He was a humanitarian of the sentimental variety, and his call to a simple life made a powerful appeal to a people that had been long fed on the dry husks of conventionalities, and had been oppressed for centuries. Civilization, he asserted, was the cause of nearly all the evils under which the world was suffering its long agony. Men, he said, had been led astray, and what was needed was that they should abandon all the useless and galling trappings of civilization, and retrace their steps until they could find once more the peace and simplicity of nature and of the primitive races of mankind. He became an apostle of a new creed for a generation long used to hardship, contumely, misery and hunger.

This seems to us to be a mere paradox; but it was not a very obvious paradox when the arts and sciences had added but little to the comforts and conveniences of life, and when the mass of the people would really have been happier in a semi-barbarous condition. The philosophy of the sage of Geneva exactly suited the time, since it was an indictment of all existing institutions, and the people were now bent on a work of extermination.

When Robespierre first arose to address the National Assembly—a small man of insignificant appearance, thin, prim, formal and precise, dressed like a dandy of the period, uttering his carefully prepared sentences in a shrill, wiry voice, the chamber burst into laughter, and continued to laugh until the orator took his seat. But affairs were much changed now, and the derided deputy from Arras was at present master of the situation. He had, save in the mere name and symbols of royalty, become a much more absolute monarch than Louis XIV. had ever been. After sending Louis XVI. to the scaffold, he was destined to follow in the same royal road, and to die in the same royal manner. He was an ardent admirer of Rousseau; and could boast that when he was young and poor he had made a pilgrimage in order that he might look on the face of the dying philosopher.

The destructive influences of the period soon accomplished wonders; but the work of rebuilding hardly kept pace with that of demolition. At last the question arose as to what was to be done with the immense web of conflicting laws that held the country in its folds. It was easy enough to repeal them, but what should be put in their place?

The problem as to the adoption of a code came up for the first time in the Constituent Assembly. All were agreed that a code should be made, and that it should be "as simple as nature." It might have been suggested that nature is not particularly simple, being the most complex thing of which we have any knowledge; but they did not think of that. The code must be so plain that any adult person could understand it without any extrinsic aid. Sieyès proposed that juries should be judges both of law and of fact, and that for the present they should be composed only of men learned in the law; afterwards, when the people had become familiar with the new code, juries might be made up of laymen. The same subject came before the Convention in 1783. Cambacérès said that there would be no difficulty about questions of law and fact after the laws were simplified, because the laws would be well known, so that there would be but little litigation, and the few suits that were brought would be easily and speedily decided. Barère, after his fashion, delivered a labored oration, judicial in tone, but always appealing to the worst passions. He wished to disperse that "flock of judicial ravens, the secret enemies of the Revolution, by destroying their nests." Ambulatory juries, he said, bound by no forms, would render justice better and would be less expensive. The code would be simple and plain, so that anyone could understand it. Chabot said that if the laws were not simple they must be simplified. He declared that he knew no other law than that of nature, and that a simple code could not be long.

Some of the lawyers present were not agreed as to the facility with which a code might be compiled. Herman said that it was madness to suppose that a code could be made intelligible to all the people. Robespierre declared that laws were then being made for a people whose manners were not of that simplicity that brought them close to nature. Héroult de Séchelles, chairman of the Committee of Public Welfare, said that it would take a very considerable time to produce a uniform code of the civil laws. Thuriot said that it would take at least two years. Chabot rejoined that nature, the great masterpiece, displayed unity and simplicity in all its movements, and that the law should be based solely on the maxim that we should not do unto others what we would not have them do unto us.

Certainly a more singular lot of men never got together to discuss legal questions. Of these, Robespierre, Herman, Chabot and Héroult de Séchelles perished by the guillotine, while the others escaped in different ways as by a miracle.

These figures that flit across the pages of history now as im-

palpable as the unborn progeny of Banquo before the startled gaze of Macbeth, were very much in evidence in those days. No one could then conceive that in a short time the members of the deliberating assemblies would be awfully thinned out by the "public utility" then performing its ghastly functions in the Place de la Révolution; but it is always probable that the improbable will occur, particularly so in times of revolution.

Hérault de Séchelles was a young and rich lawyer of Paris, of much cultivation, who had joined the party of Danton, and had taken a hand in many of the excesses of the period.

Chabot was from the Dordogne. He had been a monk and a priest; he was now a vile demagogue, a forger and a thief. Barère was from the south of France. His career is reviewed in a well-known essay by Macaulay, who considers him as the worst character produced by the Revolution; a question not easily decided. Thuriot was an able lawyer of Paris, an avowed enemy of Robespierre, and was later very efficient in his overthrow. Siéyès was a Parisian priest; Herman, a mild-mannered man from Artois, a lawyer of far more than average learning and ability. Robespierre had known him before the meeting of the States General, and as they were kindred spirits, he promoted him to the presidency of the Revolutionary Tribunal, a court not organized to try, but to convict. Herman was the Jeffries of the Revolution, obeying the nods of Robespierre just as his prototype obeyed the behests of James II. Both were insatiable human jackals, always eager for blood.

It must be confessed that Cambacérès, chairman of the Committee on Codification, was not sincere in his expressions as to the absolute simplicity of the law; but, it must be added, that he was acting under extraordinary constraint.

After the fall of Robespierre, when some one asked Siéyès what he had done during the Reign of Terror, he answered that "he had lived"; which was no small feat, since he was hated by the "sea-green Robespierre," as Carlyle calls him. Siéyès had effaced himself. Cambacérès fell upon another method. He seemed predestined to the guillotine, because he belonged to a privileged class, and had voted against the death of the king. He devoted himself with great energy exclusively to the work of compiling the code, adopting the tactics of delay that had been practiced by Queen Sheherazade, if we may believe the story as told in the Arabian Nights; surmising that he might be spared on account of the public importance of the task that he had in hand; a ticklish theory that turned out to be correct. He escaped, protected by the invisible ægis of the law.

Cambacérès was a highly educated lawyer from Montpellier, a member of a family that had long been distinguished at the bar. He was remarkable for his clear insight into men and things, for sound and excellent judgment, and for undoubted integrity. He afterwards became the safest and most trusted adviser of Napoleon. He tried in vain to prevent the seizure and execution of the Duke d'Enghien and the fatal invasion of Russia. Under Napoleon he occupied the highest positions in the State, and received from him the title of Duke of Parma, by which he is sometimes known.

The first debate in the Convention that has just been mentioned took place on the 10th of June, 1793. On the 9th of the following August the committee reported a code in the bombastic language suited to the time and the occasion. This code, as asserted in the report, was "the fruit of liberty," which "the nation would receive as the guaranty of its happiness, and which it would some day offer to all peoples on the earth; a gift which they would hasten to accept when all prejudices should have been dissipated and all hatred should have been extinguished." Besides, "it was made for all men." It was so simple that it could be understood by all; science was chimerical, and hence nature was the only oracle that had been consulted, and so on.

The "code" thus eulogized was indeed simple, since it was hardly anything more than a collection of moral maxims, and was, in fact, no code at all. It was deemed by the Convention, however, to be too complex; and so it was sent back to the committee for simplification.

On the disappearance of Robespierre, things took a new turn. Other reports were made, but there was no longer any talk about the simplicity of nature, for they dealt with the texts of Roman law and similarly substantial topics. The committee had got down to intelligent work, and was making progress towards a useful compilation of the laws; and, as long as the Convention lasted, the task was prosecuted with zeal and energy. It was taken over by the Council of Five Hundred; but, under the languid government of the Directory, it seemed that it could never be finished.

Then, in 1799, Napoleon came on the stage; and while he was there, there was no room for anyone else. He was then a young man of 30. Having acceded to power, and perceiving the fame and prestige to be derived from the completion of the code, he resolved to enter upon the task that had been so long delayed. He had not a drop of French blood in his veins; neither in name, in personal appearance, language, modes of thought nor action was he a Frenchman; but if Justinian, who was a barbarian, had codified

the laws of Rome, there could be no good reason why a Corsican should not codify the laws of France. The First Consul, now an autocrat, appointed a commission headed by Tronchet, and including Portalis, Bigot de Préameneux and Maleville, to review the work so far as it had already advanced, and to improve on it as far as possible.

Napoleon hated all practicing lawyers more than any other class of persons because he was a military man, and, as such, had no patience with the methodical and cautious proceedings of the courts, and especially because the lawyers in their trials frequently criticised the acts of the Government in a manner that he disliked. When at leisure, he was an omnivorous reader, but during his active career he had but little time for reading; he retained, however, a prodigious thirst for knowledge, toward which he made a short road that could be rapidly traversed. Wherever he went in his campaigns he was always attended by a corps of experts in all the important sciences. Wherever he might be, in his few hours of leisure he preferred to converse with learned men; and in that way he acquired an astonishing amount of information on all kinds of subjects. He cared nothing about processes; he only wanted ultimate facts. Hating practicing lawyers as he did, he was fond of talking with eminent jurists, so as to get their views as to jurisprudence directly and not at second hand, and in an exceedingly condensed form. His genius was elementary and irreducible, not to be decomposed or analyzed; and he remains today strangely inscrutable. To those who knew him at that time he was a mystery and a portent; and he remains a mystery yet, in spite of the thousands of books written about him in all languages; one of the most mysterious of all the characters thrown upon the screen of history. Those who knew him best differed widely as to his qualities. Bernadotte, who was an intelligent man, said that the foundation of his character was a disposition to indulge in jests, which were almost always in bad taste; but that was merely a surface indication. Bourrienne, who had known him from his boyhood, and who was a dull, plodding sort of person, perceived a fact that was hidden from wiser men. Napoleon, he tells us, was a fine reader, and an accomplished elocutionist; and that on the stage he could have given points to Talma himself. It has been said by some one that all great men are actors. It is not true. No one would think of applying such a saying to Washington, or Lincoln, or Lee, or William the Silent. But it was true of Napoleon. He was not an actor in lofty and well-sustained tragedy; with due regard to the unities of time, place and action, like Cæsar, who, in his last hour, under the wounds of his assassins, expressed

no surprise except that Brutus should be found among the conspirators, and so spread his cloak to fall upon, in order that he might make a suitable end to a great career never to be forgotten. Napoleon was rather an actor in a vastly complex tragi-comedy; one who was never off his guard in the many parts that he played. Doubtless the standards by which we judge ordinary men are quite inadequate for a man of his prodigious genius, perhaps the most remarkable that has ever appeared on earth; but it may also be added that it is difficult to take the profile of one that always wears a mask. A curious book might be made of character sketches by hundreds of writers of this many-sided man, each reflecting the mind of the artist and not the subject of the sketch, no two alike.

We are now to see him in his rôle of lawmaker, in his best estate, when he had not as yet become wholly hardened by unexampled prosperity, and had not reached those sad and terrible days when, as he repeatedly traversed the continent of Europe, always by his side there flowed a river of human blood. It is probably not in the nature of things that any man could have his experience without great deterioration of character. Alexander was a king and Cæsar was a patrician with great family influence. Napoleon had no adventitious aid. Born in an obscure village on an island remote, the son of the widow of a needy lawyer, educated at the public expense, in a few years he sat on the throne of Henry IV. and of Louis XIV., with kings waiting in his antechamber, the arbiter of the destinies of Europe.

It was not yet fully known that this strange young man, on whom the eyes of the whole world centered, possessed a genius for finance, for administration and statesmanship quite equal to his genius for war; that in addition to his ability for colossal combinations, he had a grasp of the smallest and most minute details that seemed almost intuitive. In one respect his genius was probably unique. Alexander and Cæsar were both extremely precocious in their early youth; but in the youth of Napoleon neither his teachers, his fellow students, nor any one else, perceived any sign of future greatness. The recently published volumes of M. Masson, containing the early writings of Napoleon, produce the same impression. Though his character was early developed, his genius seems to have come as an inspiration, and to have gradually faded in the latter part of his career. When it came he was as much surprised as others, for he said later that it was not until he had been in several battles that he discovered his talent for war.

The choice of persons to engage in the farther prosecution of codification was so prudent and wise that probably it could not have been bettered.

Tronchet was born at Paris, and was a jurist of great learning. He was at that time 73 years of age. For many years he had not appeared in the courts, during which time he had a very extensive practice as a consulting lawyer. On the breaking out of the Revolution, he was elected a delegate to the States General. In 1792, on the request of Louis XVI., he defended the king on his trial fearlessly and with great ability. On the conviction of the king, Tronchet retired into concealment until the fall of Robespierre. Napoleon, at St. Helena, said that Tronchet was the soul of the commission for the codification of the laws. He was very familiar with English literature, and published French translations of the poetical works of Milton and Thomson.

Portalis was 54 years old. He was born at Bausset (Var.), and practiced his profession at Aix. It was said of him that he demonstrated "how a genius for administration could be combined with the heart of a patriot, the talents of an orator and the learning of a jurist." He appeared as counsel for Madame Mirabeau in her celebrated suit against her husband for a divorce, in which Mirabeau defended himself with all the resources of his powerful eloquence, but in vain. On the breaking out of the Revolution, Portalis removed to Lyons, and then to Paris, hoping to lose himself in the multitude. He was, however, discovered, arrested and imprisoned, and was released only on the fall of Robespierre.

Bigot de Préameneux was 52 years of age. He was born in the city of Rennes; but, having completed his education, he removed to Paris, where he soon acquired great fame as a jurist. He was elected a member of the National Assembly in 1791. He had embraced the cause of the Revolution, but with so much conservatism that he was compelled to conceal himself during the Reign of Terror. Napoleon made him a count of the empire and grand officer of the Legion of Honor.

Maleville was 58 years old. He was born at Domme, in Périgord; but practiced his profession in Bordeaux. He approved of the Revolution, and favored the establishment of a constitutional government. He was profoundly versed in the Roman law, and was, on the accession to power of Napoleon, made a judge of the Court of Cassation. As a member of the Commission, he is said to have distinguished himself "by the purity of his doctrines, his mental sagacity, and the extent of his learning."

Cambacérès was not placed on the Commission because as Second Consul it was his duty to preside over the Council of State whenever the First Consul might be absent.

The draft of the code was finished in four months. It is per-

fectly plain that such an expeditious result could not have been accomplished if it had not been for the previously accumulated materials and arduous labors of Cambacérès and his committees.

When the draft was completed, it was sent to the Council of State, where each section was examined critically. After a decision was made by a vote the section was printed, and copies were distributed to all the members. Copies were also sent to the judges of the Court of Cassation and to those of the various Courts of Appeal, and these tribunals made their reports to the Council of State. Copies were also sent to the Tribunal, where every article was discussed, and was returned to the Council of State as adopted, rejected or amended. The entire work was completed in about four years, was adopted by the legislative body, and was published in 1804, with all the reports, and with all the discussions in the Tribunal and Council of State, showing the original draft and all changes made.

When Louis XIV. went into the business of making laws, he presided over the Council of State in his usually urbane manner, but said nothing. With Napoleon the case was different. His council was held in the Tuilleries in 102 sessions, over fifty-seven of which he presided; and, when present, he always took an active part in the debates.

There was a fascination about the conversation of Napoleon which few could resist; a charm that cast a spell over everyone who heard him, provided he thought it worth while to use it. Lord Keith, who had met him after his surrender on the Bellerophon, when some one suggested that Napoleon should have been allowed to remain in England, said, "Damn the fellow! If he had obtained an interview with the Prince Regent, in half an hour they would have been the best friends in England." Many other contemporaries give similar testimony. But he was never so agreeable as when in consultation, on which occasions he always displayed all his marvelous powers of argument and persuasion. Thibaudeau, who was present during the sessions of the Council of State, says that "he regulated and directed the discussion, guided and animated the debate. He spoke without preparation, without embarrassment, without pretension, freely, in a conversational tone, naturally animated as the subject became absorbing from difference of opinions and according to the state of the contention. He was never inferior to any member of the Council; sometimes he was quite equal to the ablest of its members in the facility of seizing the very point of the questions, in the justness of his ideas and the force of his reasoning, while he often surpassed his colleagues by the turn of his phrases and the originality of his expressions."

M. Sorel says: "His want of judicial studies, far from embarrassing him, gave him an advantage in this assembly, where such studies played too great a part, and where the discussion often tended to degenerate into quibbling, subtleties and endless distinctions." He adds: "If the provisions of the civil code expand so easily to all the practical realities of life, adapting themselves with elasticity to varying circumstances, the fact is largely due to the intervention of the First Consul, to his insatiable love of clearness, his imperious demand for precision in thought and expression and to his inscrutably realistic and concrete genius."

With the Code was published, in eight volumes, the Conferences on the Civil Code, containing carefully prepared reports of the speeches, or rather talks, made in the Council of State. In reading them one would hardly distinguish Napoleon from the other eminent jurists present, except that on two or three occasions, by some expression he showed that he was not to the manner born. I intended to give some extracts from his discourses, but I found that by so doing I should make this address too long.

All the fields of jurisprudence have been so assiduously cultivated that it may be doubted whether originality in the law is any longer possible. What we call new laws are generally—if not always—mere variations on themes, more or less ancient. At any rate, the Code Napoleon contains not a single original thought, being made up of customary laws—wholly excluding all feudal laws and customs—of royal ordinances and of principles borrowed from the civil law, expressed with the greatest possible clearness and brevity. As there is no judge-made law in France, and judicial decisions are not precedents, the provisions of the code have not been affected by a century of conflict.

So, this code of substantive law, composed of 2281 sections, finally got itself made; a truly great and enlightened compilation, whose influence has been greater than any similar work accomplished since the days of Justinian.

At first the code was simply called the French Code, but in 1807 it was by legislative act called the "Code Napoleon." At the Restoration its name was changed to the "Civil Code," and it was not until the accession of Louis Napoleon that it was again called by the name which it still bears.

Napoleon was very proud of it, and was extremely angry when he first learned that some one had published a commentary on it, exclaiming, "My code is lost!" At St. Helena he said that he would not be remembered for victories gained in forty battles, but that he would go down to posterity with his code in his hand. Of all his immense domain, one embracing the very soil on which we

are now assembled, of all the vast powers that he had exercised, this was all that was left.

He certainly possessed a genius for the destruction of his fellow-men. Had England not interfered, he would have repeated the exploits of Alexander, would have depopulated the Orient, and would have founded a barbaric empire of his own. Repulsed in that enterprise, the storm burst with all its fury nearer home. Alas for poor humanity! This restless man, who, according to Thiers, by his indefatigable energy at last wearied the universe, said on his lonely rock at sea, that his wars had caused the death of a million of people; but more impartial statisticians have estimated that that was only about one-third of the real number that perished in his campaigns; and all this that he might have twenty years of what he called "glory," that he might wear once or twice some braided metals called a crown, and a mantle embroidered with golden bees; and that he might acquire a wide renown that avails not now, where he sleeps under the dome of the Invalides.

Compared with this tremendous holocaust, the proscriptions of Robespierre, and even those of Marius and Sylla, sink into insignificance. Louis XIV., in his old age, said that he had loved war too much. It would have been well if he had thought of it sooner; well for Napoleon if he had taken the saying more to heart. Perhaps the aged monarch felt some compunction for the many towns and cities that he had burned; for the flourishing countries that he had desolated; for the untold and immeasurable calamities that he had inflicted on his fellow-men by ruinous and useless wars. It is not to be denied that there have been many justifiable wars, but most of those of Napoleon were dictated by motives of personal ambition alone.

At St. Helena one day, when Gourgaud complained of some real or fancied affront, the emperor said: "You speak of sorrow! You! And I! What sorrows have I not had! What things to reproach myself with! You, at any rate, have nothing to regret."

On another and similar occasion he said to Gourgaud: "Do you suppose that when I am awake at night I have not bad moments—when I think of what I was and what I am?"

One can not but wonder whether, after his active career was ended, when at midnight the storm seemed to rock the walls of his lonely prison, Napoleon did not seem to hear the voices of the innumerable dead wailing in the homeless wind, or whether in his dreams he did not perceive a vast army of skeletons of young men, untimely slain in battle, extending over his little island, and even out at sea, silently reproachful, reminding him of the vanity

of human ambition. Now everything was gone; the Berlin decree, his bevy of kinglets, all the "pride, pomp and circumstance of glorious war," and only the code was left.

Of that code he might well be proud. After the union of Sardinia with France, it was put in force in Italy. Though it did not survive there the fall of the emperor, codes adapted from the Code Napoleon were established in Parma, Modena, Tuscany, Genoa, Lucca, Piombino, Naples and the French cantons of Switzerland. It was also adopted, or rather imposed, by the conqueror, in Westphalia, in the city of Dantzic, in the principality of Arenberg, in Russian Poland, in Holland, the Grand Duchy of Berg, in Frankfurt, the Hanseatic Departments, the Duchy of Anhalt, in Baden and the Kingdom of Illyria; but these were repealed on his fall from power. It is still in force in Belgium, and very similar codes have been adopted in Hayti, in the Ionian Islands, in Louisiana, in Quebec, in Egypt, in Italy, Japan, in the Grand Duchy of Luxembourg, the Principality of Monaco, Holland and Roumania, and in various South American countries. It has even had a considerable influence on the development of the Prussian law. Wherever codes have been based on the Code Napoleon the purely French element has tended to disappear and to be replaced by the doctrines of the ancient Roman civil law, and by a distinct preference for local customs in many instances very different from those of France; but still the integrity of the original has been largely preserved.

Quite variant from his personal destiny, the code has no doubt succeeded far beyond the most sanguine hopes of Napoleon. Within the last few months, the French Parliament has referred it to a council of revision. The principles which it embodies and most of its arrangement and sequence will probably be preserved for centuries to come. The fame of Justinian rests chiefly on his legal compilations. Though he had many wars, these are well-nigh forgotten; and so it may come to pass that the wars of Napoleon will be, to use his own expression, eventually "lost in the vortex of revolutions"; and that, as he prophesied, he will go down to a very late posterity "with his code in his hand," his most meritorious and indestructible claim to perpetual remembrance.

EVOLUTION OF THE LAW BY JUDICIAL DECISION.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

ROBT. G. STREET,
OF GALVESTON, TEXAS.

"It would be wearisome to enter on a detailed comparison or contrast of English and Roman equity; but it may be worth while to mention two features which they have in common. The first may be stated as follows: Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus; after which, though the whole Roman world was undergoing a moral revolution, the equity of Rome ceased to expand. The same point of legal history was attained in England under the chancellorship of Lord Eldon. * * * It is easily seen by English lawyers that English equity is a system founded on moral rules; but it is forgotten that these rules are the morality of past centuries—not of the present; that they have received nearly as much application as they are capable of, and that, though, of course, they do not differ largely from the ethical creed of our own day, they are not necessarily on a level with it. The imperfect theories of the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on Equity, struck with the completeness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the chancery jurisprudence contemplated its present fixity of form when they were settling its first basis. Others, again, complain—and this is a grievance frequently observed upon in forensic arguments—that the moral rules enforced by the Court of Chancery fall short of the ethical standard of the present day. They would have each Lord Chancellor perform precisely the same office for the jurisprudence which he finds ready to his

hand, which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies" (Fictions, Equity and Legislation), "by which the improvement of the law is carried on. Equity has its place and its time; but I have pointed out that another instrumentality is ready to succeed it when its energies are spent" (meaning legislation). *Maine's Ancient Law*, pp. 68-69-70-71.

"However severely and peremptorily equity, and all the arbitrary judicial power implied in its exercise at particular epochs, may be controlled and discredited, there is reason to think its resurrection must be constantly waited for. So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The invariable reaction against this stage is manifested in a progressive extension, modification, or complete suspension of the strict legal rule into which the once merely equitable principle has been gradually contracted. Thereupon follows not only a special logical method for the creation of a new series of modifying principles in obedience to the claims of a higher moral standard, but also a vast multiplication of channels for social and commercial activity, and a general conviction of the inadequacy of the existing law.

"It is true that conscious legislation, proceeding from the supreme political authority, as well as other modes of judicial legislation, to be shortly enumerated, will compete, to an increasing extent, with the progress of equity. But it is impossible that the functions of equity can, by any of these rival forces, be entirely superseded. Equity works more assiduously and consistently than political legislation, and is more delicate, and perhaps more silent and obscure, than the judicial interpretation of written law, which will immediately appear to be its more formidable competitor. Thus the history and the nature of equity may be properly held to be a permanent topic in the exhibition of the Science of Law." *The Science of Law*, Amos, pp. 57-58.

"The conservatism that would make the instance of today the rule of tomorrow, and thus cast society in the rigid moulds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice that belong to free, rational and imperfect beings; and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idiosyncracies; each of these extremes always tends to be converted into the other, and both stand rebuked in every volume of our jurisprudence.

"And the medial aspect of the doctrine stands everywhere revealed as the only practical one. Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct and common feeling of right; not as withholding allowance for official fallibility, and for the changing views, pursuits, and customs that are caused by, and that indicate an advancing civilization; not as indurating, and thus deadening the forms that give expression to the living spirit; not as enforcing 'the traditions of the elders,' when they 'make void the law' in its true sense; nor as fixing all opinions that have ever been propounded by official functionaries; but as yielding to them the respect which their official character demands, and which all good education enjoins.

"When the varied surface of this earth is changed into a dead level, and the ocean's waves are still, then man will need another habitation.

And when the variety of human action and development is subjected to judicial and legislative prescriptions, and the rule of man's free and educated reason is proscribed, with all its improving diversities, and all reasoning becomes illegal, if the subject has been already reasoned upon by judges or decided upon by them without reasoning, then man will need another jurisprudence, and another legislation, without, perhaps, being capable of enjoying them." *Callender's Administrator vs. Keystone Mutual Life Ins. Co.*, 23 Pa. St. Rep., p. 474, Lowrie, J.

"Not from the *Prætor's Edict*, nor from the Twelve Tables, as the lawyers say, but inwardly, from the most profound philosophy, is the discipline of the law to be imbibed." Cicero's "*De Legibus*."

SYNOPSIS.

Public opinion source of all law: worth proportioned to responsiveness and agencies for assimilation of intellectual and ethical advance in civilization. Development of Common Law; agencies; Roman Law, Procedure, Fictions, Equity, Legislation, Decisions. Proposition discussed: Scientific advance made only by Decisions, which, by attributing too much importance to dead formula and by too rigid a construction of stare decisis, are making the law reflect not our own civilization, but socially, intellectually and ethically that of the 18th century and earlier. Evil impossible to have been foreseen by founders because incapable of the conception of an advancing civilization. Remedy: Back to Natural Reason; improved by the wisdom of the ancients and knowledge of the moderns in social science, ethics and philosophy and study of comparative law, with restriction in highest appellate tribunals of force of stare decisis to "not despotically to govern, but discreetly to guide," making law responsive to matured public opinion and harmonizing it with present intellectual vision and more stringent and refined ethical conceptions.

The consideration of the great part borne by Judicial Decision in the framework of Anglo-American law, its influence on the structure of our jurisprudence, calls for some preliminary reference to the source or genesis of such law and the agencies in its development, which, in turn, invite for verification a limited discussion of the source of law in general and the means, designed or naturally arising, operative in the past for its improvement.

Public opinion is everywhere and at all times the source of all law—meaning private law, the sense in which the term is always to be understood when standing alone—and is responsible as well for the non-existence of laws. And though, on due reflection, this statement may appear a truism—for it is impossible to conceive how, except spasmodically, it could be otherwise—yet the explicit statement of the proposition here is rather the conceived result of modern thought than of accepted previous exposition. Glimmerings of its recognition may, it is true, be found as far in the past as the writings of the ancient Greek philosophers; but with their institutions, city governments, slavery and subject provinces, it did not possess for them the broad application and deep signifi-

cance given it by the present widespread development of political freedom and popular government. With Aristotle it was an abstract speculation, with moderns a conclusion of induction. It is not improbable, so inevitably, and yet so unconsciously, are we influenced in every branch of thought by the prevailing philosophy of our own generation, that this conclusion is due to, or derives its present emphasis from, the doctrine of evolution, and the application by analogy or reality of that biological theory to social life. The proposition may also be considered a correlative of the doctrine maintained by some that sovereignty everywhere rests in the people; but, as private law offers little or no temptation to arbitrary interference by political power, and in its history has been all but free from such influence, acceptance of that doctrine is not essential to its support—unless, indeed, on the subtle refinement of Austin that the sovereign commands what he suffers. Laws not enforced because contrary to public opinion are, of course, in no proper sense laws at all.

Custom, then, though the most obvious concrete expression of public opinion, is but one mode by which this opinion becomes incorporated into the laws of a country where it prevails. Political legislation and legislation by Judicial Decision are, in modern times, the most powerful agencies in the development of the law through which public opinion is manifested. It is true that in some States, owing to a static condition of ignorance and oppression that has prevailed for centuries, public opinion, in a broad and liberal sense, can scarcely be said to exist at all when compared with the mighty force it has always been in the United States and in Great Britain and her self-governing colonies, and is beginning to be in France, Italy, Germany and Russia. In such States, superficially viewed, the laws would seem to have been superimposed rather than to have arisen from a source so remote and obscure. Viewed in like manner, it would also appear that at great crises in the history of all countries, law as a governing force emanated from great men rather than from the body of the people; but more thorough examination will not fail to convince the student that even in such cases the ultimate source of law is public opinion; and what seems at first glance opposed to this theory is but a difference in the manner of its manifestation. It is true that a great man, a despot, or an aristocracy, the product of past ages co-operating with social environment, once firmly entrenched in power, may, by oppression and suppression, for a time silence the voice of public opinion or even seem to extinguish it; but ultimately public opinion reasserts itself, through revolution, rather than by evolution independently considered, as in France in 1789-

1793 and in Russia today. It is thus evident that by the reflex action of institutions which the people themselves have created their voice may for a time be silenced. The fact, however, that the law lags behind public opinion is no reason for the denial of the principle of its dependence on it; that it lags too far behind in our time is the occasion for the remarks here submitted. If the laws anywhere seem to be dictated by a despot, an aristocratic oligarchy, or at any crisis by a great man, these agencies are at last but the exponents through which the silent forces of public opinion express themselves. The principle is organic in social development. It is not consciously adopted, it is not a theory of philosophy or a speculation, but a process of organic growth.

The *corpus juris civilis* itself presents the most notable instance in the world's history of the futility of the attempt to superimpose laws, to impose laws from above, laws representing the opinion of the "best" rather than of the public. "It was too good for the age in which it appeared." All the efforts of the Emperor Justinian to put it in operation in the Byzantine Empire, and, on the partial reconquest of the West to introduce it there, were in vain. It could not arrest the descent in civilization of a people from whom it had not sprung, and it was not until the close of the Dark Ages, some seven centuries later, when the people had arisen to a higher state of intelligence, that its introduction became possible and its enforcement practicable, though its study seems never to have been entirely neglected.

RESPONSIVENESS OF LAWS.

The difference in the responsiveness of laws to public opinion is one of degree only and dependent on a variety of social and political conditions, such as the measure of individual liberty enjoyed, commercial relations, the hereditary genius of the people, the stage of civilization, freedom of speech and opinion and of the press and of religious worship.

These reflections bring us face to face with two of the most far-reaching propositions that engage the attention of publicists today, the consideration of which is well calculated to moderate the excessive zeal of reformers—social, legal and political—and to rebuke the indiscriminate abuse of great men, of unequal laws and of tragic eras and events in the history of the past. These are: (1) Whether it is not probably true that every people have such laws as are best suited to its own condition, though few may have such as are best calculated to promote higher development. (2) That all things are relative, except a few fundamental moral max-

ims presupposed by the positive laws of civilized States; and hence, to determine rightness or wrongness, historical data must ever be viewed in the light of the accepted standard of their own day.

It is the exceptional glory of the United States and England in the past that their laws, through political legislation and judicial decision, have been most responsive to public sentiment. They so continue to be developed by political legislation, because in them the elements of social and political life are so happily combined as to foster the development of intelligent public opinion under free institutions and to give it expression through representative government. Though, as to changes either in the Federal or State constitutions, it must be admitted that the responsiveness of the laws is readier both in England and in France than in the United States because of the greater ease with which such changes may be effected in those countries. But this safeguard is deemed indispensable in a Federal State, and whether it is, on the whole, to the disadvantage of the United States may well be questioned. In the advanced civilizations of today, in the great light thrown upon early times by recent historical and archæological research, with the free intercommunication and hence interpenetration of enlightened thought throughout the world, we should free ourselves from the narrow, optimistic and self-glorifying species of patriotism which would attribute to our own system of laws an exceptionally honorable origin, as the customs of the people, and seek to establish as its true title to pre-eminence the high degree of responsiveness it gives to matured and intelligent public opinion through representative government and by judicial decision.

SCHOOLS OF JURISPRUDENCE.

No more useful lesson has been taught the present generation than that in the investigation of historical institutions, systems of religion, ethics and legal science, the true rule in appraising their value and to avoid hasty condemnation is that of considering the causes of their origin and growth and their conformity with contemporaneous conditions, physical and political, social, ethical and legal. Though the Historical school of jurisprudence rests on the theory that law is a social product, yet its votaries, from excess of veneration for the past, often fail sufficiently to recognize and appreciate the importance of changes needed to conform to present requirements laws that have become anomalous, archaic or anachronistic. Here it is that the method of the Historical school should be supplemented by that of the Analytical, and genesis of a particular law, practice or procedure having been discovered, the true forces of its growth explored, and its conformity to the

conditions of its origin considered, no presumption should be indulged of its present applicability merely because of its retention—as was implied in the declaration of a distinguished Lord Chancellor that he was in favor of all established institutions and in favor of them because they *were* established. But if, on a true analysis of present legal conceptions and existing social conditions, laws shall be found no longer desirable or consonant with public weal and future progress, they should, with pious regard for their past efficacy, be consigned to their honorable place in the history of the law's development. The real desideratum in such case is to procure this inquiry, free and untrammelled, alike uncontrolled by veneration for the past or enthusiasm excited by generous hopes for the betterment of mankind. To disabuse the mind of the controlling influence of the past over existing laws was the supreme effort of Bentham and Austin; and in the act of emphasizing the improvement of the law by judicial decision, it is a pleasure to render a tribute of justice to these eminent men who, by the "destructive breath of criticism," more than by actual constructive work, effected so much in this direction; and, notwithstanding a somewhat general disposition of late to disparage them, it is a pleasure to note the high appreciation of their great influence upon the legal thought of today by such distinguished writers as Sir Henry Maine and Prof. Bryce, and by Prof. Dicey, the present occupant of the Vinerian Chair at Oxford, first filled by Mr. Justice Blackstone. Undoubtedly the best results in legal study are to be realized only from combining the virtues of both the Historical and Analytical schools as well as the Metaphysical and Comparative.

AGENCIES IN THE DEVELOPMENT OF THE LAW.

The development of the only two great systems of law of which we have any orderly account, the Roman law and the common law, has progressed from the most primitive times, more or less in conformity with the spirit of the age, by means of well-recognized agencies, the chief of which have been Fictions, Procedure, Maxims, Equity, Political Legislation, the opinions and treatises of learned jurists, and Judicial Decision, with varying degrees of emphasis. This apparent coincidence has been thought to authorize the inference that the process is one of natural growth. These agencies have been resorted to as a relief from the too great austerity or rigidity of the law arising from mental and ethical limitations in the ruder times of the past and expressed in the iron-clad forms of pleading and procedure within which justice as administered was compressed. They are to be regarded as means

adopted to render the law more responsive to new conditions or more highly developed intellectual and ethical thought. The inability in rude times to conceive the necessity for elasticity in the laws, and the dominant tendency to achieve the greatest possible certainty in prescribing remedies, resulted, both in Rome and England, in the restriction of legal rights to those enforceable only in four or five forms of action. The attempt to remedy this defect in England in the time of Edward I. by requiring the clerks in chancery to devise new writs was so sparingly executed that the demand for relief greatly accelerated the growth of the equitable jurisdiction of courts of chancery, separately exerted. In Rome, as early as the 4th century B. C., the Prætor by proclamation annually enlarged rights and extended remedies until in the 4th century of our own era mere forms of action disappeared, all blending into one. The analogy between the institution of equity at common law and in the Roman law is generally deemed very close and their growth due to the same causes; indeed, this analogy, or similarity, is generally assumed as a sufficient basis for declaring that a progressive legal system must always pass from a stage of rigidity to one of greater expansion by the introduction of some such independent agency as Equity; and the failure of other systems, as those of India and China, to progress in like manner is attributed to the absence of such agency; or, as I think it would be more accurate to say, to the lack of national characteristics and social conditions giving rise to a public opinion requiring such change.

Besides the annual proclamations of the Prætor, the Roman law was developed mainly by the responses of the jurisconsults on the Twelve Tables; and the modern codes of Western Europe, based on that system, continue to be most largely developed through analogous interpretations of the codes by the opinions of learned writers embraced in treatises and adopted in judicial administration; a process of development itself largely analogous to that in England and the United States by Judicial Decision, with this material qualification, however, that the opinions of learned writers have not with the civilians the absolute force of the common law doctrine of *stare decisis*, but an instructive force and an advisory effect, such, for example, as is accorded in one State of the Union to the decisions of the final appellate courts of other States.

ROMAN AND CIVIL LAW.

The Digest or Pandects of the *corpus juris*, compiled by the great Trebonian and his coadjutors, containing all that is most valuable of the responses of the jurisconsults and treatises by

distinguished lawyers for a period of a thousand years, is the greatest collection of the wisdom of the ancient world in jurisprudence that has been preserved to us. The Romans did not attempt to devise a new system of jurisprudence, with new material and resting on a new foundation; the *corpus juris* itself is but the concentrated wisdom of the past with all the changes, extensions and modifications gradually effected under new conditions of spiritual and material life throughout this long period of time. Instead of the dry and lifeless matter of modern codes, it has been well said, the Digest itself contains the reason and spirit of the law, and may be compared to a supposed compend of English and American law, such as would be made by a collection of all the most judicious statements and opinions of the ablest lawyers and judges, as Mansfield, Kent, Story, Marshall, Taney and others, arranged either scientifically or for practical convenience and easy comprehension. The *corpus juris* was based on principles of natural equity and universal reason which have not lost their force. (Bryce.) Though the indebtedness of mankind to this body of laws and to the eminent civil-law writers can not be overestimated, there is and always has been a tendency by common-law writers and judges to depreciate it. As a product of the most polite and refined civilization the world had known, and of a people with a remarkable genius for practical affairs, the natural effects of its principles on the new civilization arising in England after the Norman conquest was great. Besides, Englishmen of learning were for a long time almost exclusively ecclesiastics and acquainted with no other system. The Chancellor himself was long an ecclesiastic. The ecclesiastical courts had jurisdiction of all causes by which clergymen were affected; also of the law matrimonial, embracing divorce, separation and alimony; of last wills and testaments and the administration of the estates of intestates. The first commentaries on the common law, those of Glanville and Bracton, drew largely on the Roman law. Of the former, Prof. Maitland says, "In a sense, the whole book is Roman." Much of the latter is extracted from the same source without credit. From this source, too, are most largely drawn our systems both of Equity and Admiralty and much of our mercantile law. In the celebrated case of *Coggs vs. Bernard* (2 Raym.), Lord Holt, though but a single question in the law of bailments was pending before him, incorporated into his decision of the case the whole of the civil law on that great topic, and subsequent observance made it the law of England. In like manner, and with like effect, Lord Mansfield, in *Luke vs. Lyde* (2 Burrows), bodily incorporated the leading principles of the law merchant from the civil law and thereby

made them the law of England without proof of custom or usage among merchants, as had theretofore been required. Our own Kent and Story drank deep at the fountain of the Roman and civil law, and this influence upon our jurisprudence has been widely and deeply felt through their opinions, lectures and treatises. It must be frankly admitted, however, that insular pride and patriotism in England long caused learning in the Roman and civil law to be generally decried. And in the warmth of advocacy in America over the merits of the common and civil-law systems the same spirit has been too often manifested; due in no small measure, I think, to erroneously attributing the origin of the two systems to different sources, and a failure to recognize that the development of each has been responsive to similar causes. The influence of these ideas long led the common-law lawyer to neglect the study of the Roman and civil law. Within the recent past, however, there has been an awakening on this subject in England, brought about by the lectures on the civil law at the great universities. The lectures of Sir Henry Maine and Prof. Bryce, delivered at Oxford, and since compiled in the form of treatises, deserve special mention in this connection. The legal profession in the United States lags far behind in this respect, as do the legislative branches of the Federal and many of our State Governments in the failure to blend all actions in one tryable before the same court—a reform effected in England by the first of the judicature acts more than thirty years ago. Among the most interesting and instructive works along the line of this reform in the United States, affording a hopeful prospect for an awakening interest in the study of the Roman and civil law, are the "Introduction to the Roman Law," by Prof. Hadley, and "Studies in the Civil Law," by William Wirt Howe, both based on lectures at Yale University. The perusal of these works can not fail to impress the student with the great advantage still to be derived by the common-law lawyer and jurist from the study of the Roman and the civil law and the treatises of civil-law writers. With a just realization of the extent of our indebtedness in the past to the Roman and civil law, and the disappearance, in the broader spirit of the present, of all feeling of prejudice and antagonism and the increased cultivation of the study of comparative jurisprudence, there may reasonably be expected a greater resort in the future to these sources of legal learning as a means of the more intelligent study of our own system.

DISCUSSION.

Fictions, devised by learned lawyers and adopted by the courts, were the earliest agency employed for enlarging legal rights. We are so accustomed to consider primitive man in an ideal state, owing mainly to the teachings of religious systems and the assumptions of prevailing schools of political and economic science, it doubtless seems strange to many that Fictions should have been used by the courts in early days in aid of justice, and should in fact have been so largely instrumental in its advancement. They were amply justified in the day of their origin and long accomplished most beneficent ends; though their retention in any degree in this age, when the necessity has long passed, can scarcely escape reproach upon the plea merely of ease and convenience. They arrest development and bar progress in the science of the law by inducing contentment with makeshifts and preventing the free exercise of thought. We can not rely for their disappearance on the truth of the formula "where the reason of the rule ceases the rule itself ceases"; on the contrary, courts have often been ingenious in devising a new content for an old rule when an original one could no longer be alleged. Many illustrations of this disposition are given by Mr. Justice Holmes in his admirable work on the "Study of the Common Law."

There are certain broad legal expressions, embracing general views of the common law as a system of jurisprudence, Fictions of a different sort, still repeated by lawyers, jurists and law writers with endless iteration, as if they belonged to the absolute verities, which, opposed to the intelligence and common sense of the age, are seriously detrimental to the law's development by Judicial Decision. Unfortunately many of these erroneous conceptions being propounded in Blackstone's Commentaries with an elegance of style and diction peculiarly calculated to influence the mind of the youthful student are perpetuated among lawyers from generation to generation. It results that, always aptly phrased to import wisdom, *multum in parvo*, they become, through familiarity, the common property of the laity as well, and, continuing the error among the unlearned, at the same time expose the claims they imply to the just criticism of the more cultured. Such are, "the common law is the perfection of human reason"—originating with Lord Coke and emphasized by Blackstone; "the courts do not legislate"; the courts have nothing to do with considerations of public policy"; "precedents must be followed unless flatly absurd or unjust."

The common law is not the perfection of reason, for it is not

a mathematical science, nor does it claim to be a complete system of ethics; but it is claimed that it is the highest system of ethics regulating civil conduct founded on the sense and conscience of a free people, springing from free institutions and capable of enforcement. The courts do legislate, and do constantly decide according to their views of public policy; but they disclaim the possession of legislative power in a political sense and claim that their legislation is limited exclusively to the legal principles implicated in decisions and results from the doctrine of *stare decisis*, while it is affirmed that public policy which exerts so powerful an influence over Judicial Decision is restricted to what lawyers and jurists justly call "the spirit of law." Blackstone's construction of "*stare decisis*," equally applicable to cases at law and in equity, besides leaving the term "precedents" undefined and undistributed, is too stringent and is misleading.

Judge John F. Dillon, "The Laws and Jurisprudence of England and America," says: "A systematic, critical and thorough discussion of the English doctrine of judicial precedence, one which shall go to the root of the business, I can not but think to be a desideratum in our legal literature. This would involve a consideration of the historical development of the doctrine; its rationale, policy and purpose; its effect upon our jurisprudence as respects certainty, bulk, confidence and utility; its true limit; its merits as compared with the continental doctrine or practice; the wisdom, under existing conditions, of a modification of the scope and imperativeness of the rule in different classes of cases."

Judge Simeon E. Baldwin devotes a chapter in his "American Judiciary" to the subject of precedents, discussing it thoroughly and from every point of view, but wisely does not undertake in terms to define or give exact expression to the doctrine. In "American Institutions," Judge Baldwin says: "We have given, I can not but think, an undue prominence to judicial precedents as a natural source or enunciation of the law. The multiplication of distinct sovereignties in the same land each fully officered and each publishing in official form the opinions of its courts of last resort, bewilder the American lawyer in his search for authority. The guiding principles of our law are few and plain. Their application to the matter we may have in hand it is the business of our profession to make, and if we spent more time in doing it ourselves and less in endeavoring to find how other men have done it in other cases, we should, I believe, be better prepared to inform the court and serve our clients."

Sir Frederick Pollock, "First Book of Jurisprudence for Students in Common Law," speaking with reference to the application

of the doctrine of *stare decisis* to courts of last resort with respect to their own decisions (which is the simple and pure aspect of the rule), says: "Few definite statements have been made on the subject by persons speaking with authority and, indeed, there has not been much definite statement of any kind."

Equity was in England an artificial device resorted to as an external agency for curing defects inherent in the common law and growing out of its inability to respond by internal expansion to changed conditions and more enlightened views; an artificial device, unless, indeed, we adopt the preposterous opinion of Blackstone, expressed with courtierlike grace and extravagance, that the King by the Constitution of England is the fountain of all justice. Its principles are said to have received full exposition before the time of Lord Eldon and the services of that great Chancellor to have been rightly directed to the application and systematization of equitable principles and remedies rather than to their expansion; while the principles of the common law itself are said to have been fully declared before the English Revolution, except in so far as the same might afterwards be penetrated by equity.

The inevitable effect of the cherished legal formulas, such as "the common law is the perfection of human reason"; "the courts do not legislate"; "all principles, both of law and equity, have long since been declared and are to be found in the adjudged cases," when taken in connection with the doctrine of *stare decisis*, rigidly interpreted, which is the too prevalent tendency, has been to retard the development of our system of jurisprudence by discouraging freedom of thought and the investigation and acceptance of new ethical principles and the enlargement of old ones, and by restricting the learning of the bar and the bench almost exclusively to the adjudged cases without regard to the necessary effort to discriminate in their value. The elementary writers also, with rare exceptions, present the profession with mere digests of the decisions conveniently classified and arranged; and on questions where the courts have differed, generally content themselves with weighing authority by merely citing the number of cases on the respective sides of the question.

May we not well pause here to ask whether there is not a more fundamental error underlying this tendency that discourages original investigation, the study of the Roman and civil law, and the works of the ablest writers in science, philosophy and ethics? May it not be true that the same narrowness that in ruder times resulted in the rigidity of the forms of action at common law, and thereby limited rights, still pursues us, and that it is to our over-weening desire for the greatest possible certainty, without, how-

ever, achieving it, we owe this neglect? Undoubtedly the crutch of our system of reliance on precedent is in the claim made of greatest possible certainty. If the claim can not be established, is it not subject to the criticism that it continues to be alleged only as an excuse for narrowness? Present-day civil-law jurists and writers are certainly far from admitting the superiority of our system in this respect, and it is equally certain that the common opinion of the laity of our own country is that the claim has not been sustained. Nor am I acquainted with any eminent common-law writer or judge who has claimed that we have in fact achieved it in any notable degree. A committee, composed of David Dudley Field, Edward F. Phelps, James P. Broadhead, Richard T. Merrick, John F. Dillon and Cortlandt Parker, in the course of its report to the American Bar Association in 1886, says: "Now, the state of our law we pronounce to be one of the greatest uncertainty. Did we not see many men of fair learning and intelligence affirm the contrary, we should say that all men believed it and all men knew it. This uncertainty comes in a great degree from the nature of the sources whence the law is derived; it is made by the judiciary and not by the Legislature, made to fit particular cases and not by general rules, and made always after the fact. * * * A single word expresses the present condition of the law—chaos. Every lawsuit is an adventure, more or less, into this chaos. * * * It is idle to think of going on as we are going. The confusion grows worse all the time. The chaos deepens and thickens daily."

It was to remedy exactly such a state of uncertainty as is depicted here that had arisen in the empire from the opinions of the jurisconsults and text-writers in the course of ten centuries the *corpus juris* was compiled, enacting that the opinions of certain writers should be preferred in case of conflict and then giving Papinian's as definite and conclusive authority.

Thus admonished, we should, at least, not be unmindful of the fact that the claim of the greatest possible certainty as a justification or excuse for the failure to determine according to the highest ethical principles places upon us a burden of proof of which we have not discharged ourselves.

The common-law lawyer and jurist should no longer rest satisfied with a standard which imports by its statement that the effort to secure greatest certainty of decision must often be incompatible with the determination of the causes, in the light of highest reason, derived from reflection and the most attentive study of the greatest masters of jurisprudence, ethics and philosophy. The light of the world is in the belief that evolution or development

means progress and advancement not in material conditions of life only, but in the recognition of higher principles of individual conduct and social morality. Progress is an extension of both the moral and mental life as well as an increase of intercourse, an advance in material well-being, and an evolution of rational conduct. Social progress does indeed involve material and intellectual progress, but its vital and essential element is moral progress—the crowning glory of all material and intellectual progress, a substantive reality and the most important of all as it is also the most permanent.

The formula expressing the principle on which courts of equity now act is that they do not determine causes by Natural Reason, but according to the principles of law and equity settled and determined by decisions of more than a century ago and their subsequent exposition. The function of our courts, so far as anything new is concerned, is said to be in the application and adaptation of the legal and equitable principles already declared to new conditions that have been developed in social and industrial organization. Yet it is admittedly true that practically all of our law respecting the recovery of damages for personal injuries, as well as that of insurance, and two-thirds of the law of contracts generally, have been enounced in the past seventy-five years. In some sense, certainly, it may be said that all this is accomplished by the application of principles already enounced, but probably in no truer sense than to say that all the principles of morality are referable to the Golden Rule, or that the opinions of the jurists—consults for a thousand years embodied in the *corpus juris* are in truth interpretations of the Twelve Tables. Which is to say, that the reference to such origin is merely an historical scholasticism. Legal and equitable maxims are but a kind of “shorthand,” “symbols” suggesting to the trained mind related facts, and are misleading if they are supposed to mean anything else. Instead of being a guide in legal study, the expression that all the principles of law and equity have long since been enounced is nebulous and confusing, creating a mental obsession tending to prevent irradiation and fertilization of the mind by Natural Reason, corrected or confirmed by the study of masters in jurisprudence, social science, philosophy and ethics. Whence this dread of resort to Natural Reason? On what else are the precedents that now control decision supposed to rest? Were those who pronounced them better able to measure the chancellor’s foot for us in their day and generation than we in ours for ourselves? They had no other guide than Natural Reason except the Roman law, itself resting on

Natural Reason, unless, indeed, it was the Divine Spirit to which they so frequently appealed for sanction.

Judge Story quotes Lord Redesdale's definition of equity, and adds: "The courts of common law are * * * perpetually adding to the doctrines of the old jurisprudence; and enlarging, illustrating and applying the maxims, which were at first derived from very narrow and often obscure sources." And in concluding a survey of the development of equity jurisprudence by the great chancellors, Cardinal Wolsey, Sir Thomas Moore, Lords Ellesmere, Bacon, Nottingham and Hardwicke, and enforcing the importance of a knowledge of the origin and history of equity jurisprudence, he says that such study will help us, "in some measure, to explain, as well as to limit, the anomalies, which do confessedly exist in the system. We may trace them back to their sources and ascertain how far they were the result of accidental, or political, or other circumstances; of ignorance, or perversity, or mistake in the judges; of imperfect development of principles; of narrow views of public policy; of the seductive influence of prerogative; or, finally of a spirit of accommodation to the institutions, habits, laws or tenures of the age, which have long since been abolished, but have left the scattered fragments of their former existence behind them. * * * Such a knowledge will enable us to prepare the way for the gradual improvement, as well of the science itself as of the system of its operation."

The Twelve Tables were originally but ten; the Ten Commandments were thought, for nearly 3500 years, by the highest spiritual life of the ancient world to comprise the whole duty of man to God and his fellowmen, but in the light of the new dispensation—that is to say, of a more enlightened conscience—it was found necessary to add another.

But it is not necessary to antagonize those who fail to appreciate to its fullest extent the principle that the courts should be constantly adding to the doctrines of the common law, and correcting the anomalies in equity jurisprudence due to political bias, ignorance and corruption of the chancellors and other causes, including their imperfect development of principles and narrow views of public policy. Nor yet is it necessary to claim that the legal and equitable maxims are inadequate to cover the field of ethical thought appropriate to the law. It suffices that there should be a conscious and pervasive acceptance of the thought that the law should conform by Judicial Decision with higher ethical development in society, and should, in a measure, keep pace with moral ideas affecting civil conduct by the truer recognition and interpre-

tation of such ideas in the ethical principles that underlie all decisions.

It is, perhaps, due to the highly honorable source of customs to which the laws of England have been in the past exceptionally attributed that the system has ever been viewed by its disciples, whether the judge upon the bench, the lawyer at the bar, or the law writer, with that peculiar veneration which has led to its being optimistically called "the perfection of human reasoning." The natural result of so great a veneration has been an indisposition to keep pace with higher ethical development arising from spiritual growth and changed social and industrial conditions. And while this spirit has its great recommendation in the conservatism to which it so largely contributes, it nevertheless tends to excess. It persistently controls the average English and American judge, lawyer and law writer. Hence their overweening disposition to rely upon precedent, upon adjudicated cases; and if a case can be found determining the question at issue, however antiquated, however obsolete the reasoning upon which it was based, it is generally relied upon as conclusive, and original thought in the wide realm of ethics and upon the social and industrial changes affecting present conceptions is thereby discouraged, and, consciously or unconsciously, largely dispensed with.

Sir Henry Maine says: "The historical theories commonly received among English lawyers have done so much harm, not only to the study of law, but to the study of history, that an account of the origin and growth of our legal system, founded on the examination of new materials and re-examination of old ones, is perhaps the most urgently needed of all the additions to English knowledge. But next to a new history of law what we most require is a new philosophy of law."

Freeman, the historian, thinks that the whole history of the development of the English Constitution has been perverted by lawyers resting their views upon the erroneous theories propounded by Blackstone.

Without further citation it may be stated that the opinion very largely prevails among learned men outside of the legal profession, both in England and in the United States, that to the formulas most cherished by lawyers and chiefly derived from Blackstone's Commentaries, is largely due the want of progressive adaptation of the law by Judicial Decision to the new principles evolved by social and industrial development.

That this want of adaptation exists in a very large degree, and that it tends to the most serious consequences, will not be denied

by any thoughtful student of social phenomena possessed of a competent knowledge of the present state of our laws.

Says Mr. Howe: "The note of the present day is expansion—material, intellectual, spiritual. The movement of things is world-wide. It is not, as we sometimes say, that the world is growing smaller, but that our ideas and our interests are growing larger. In all matters there seems to be a kind of wireless telegraphy, by which those beings who are properly attuned can catch messages from all the earth." The author continues with the following quotation from Sir Matthew Hale: "These very laws that at first seemed the wisest constitution under heaven have some flaws and defects discovered in them by time. As manufactures, mercantile arts, architecture and building, and philosophy itself, secure new advantages and discoveries by time and experience, so much more do laws which concern manners and customs of men."

Prof. Henry C. Adams, in a monograph on "Economics and Jurisprudence," read before the American Economic Association in 1897, says: "Every change in the social structure, every modification of the principle of political or industrial association, as well as the acceptance of a new social ideal, must be accompanied by a corresponding change in those rights and duties acknowledged and enforced by law. Should this development in jurisprudence be arrested or pursued sluggishly, as compared with that of some particular phase of associated action, serious mischief will inevitably follow." And speaking of tendencies to collectivism, he says: "All these conceptions of social relations are imposed upon us by external conditions, and it seems clear that a new system of ethics, a new expression of rights and duties, indeed, a new definition of liberty and of the individual himself, must be crystallized and incorporated into the established system of jurisprudence before harmony can be restored between the accepted rule of conduct and these new demands of the moral sense. * * * One may without serious effort arrive at the conviction that the industrial controversies of our own time are an endeavor to reconstruct the code of ethics that underlies the accepted system of jurisprudence that social interests and the rights of individuals in associated industry may find a natural and an orderly expression." And to this maladjustment the author considers is due the enmity and violence of concentrated capital and associated labor that constitute so serious a menace in our day.

With the recognition of the right of government by the people and for the people, now so general throughout the civilized world, there has come a change of ideals in social life as a reaction from the individualism of the 18th century, a larger appreciation of

the rights of society and of social groups, such as agriculturists and laborers in industrial pursuits, which must receive greater consideration on the part of those charged with the function of Judicial Decision. Heretofore in England and in this country, because of the ideal of individualism, the effort has been chiefly to conform Judicial Decision to what was conceived to be the rights of man, but with this change of ideal, Judicial Decision must more largely conform to the Rights of Men. To some extent, a wise development in this direction has always been observable, the ablest judges having constantly in view the effect of the particular decision as establishing a rule of general application and tending to conserve and to maintain the social order, which itself represents the generalized ethical sense. The capable judge invariably seeks to decide in conformity with the Kantian categorical imperative: "Act only on that maxim whereby thou canst at the same time will that it should become universal law." He is guided by an ideal standard of moral harmony and scientific fitness. His right conception of what should be universal law must often depend on the degree with which he cognizes the social morality of his age, really or supposedly conducive to social welfare, and this he may truly and sympathetically do only by profound study and reflection, not by the contact of a mind saturated with the precepts, prejudices and superstitions of bygone ages, either with the passions and clamor of the multitude or the persuasive influences of capitalistic combinations masquerading under the claim of individual right.

The general social unrest, the bitter warfare waged between concentrated wealth and labor, is largely due to the failure of the development of our law more sympathetically with the change of ethical standards; and, if I do not mistake the significance of the facts, still more disastrous results must follow unless the widening gap is measurably filled by wise Judicial Decision, unrestrained by the rigid application of *stare decisis* seeking to determine the problems of today by the dim light of past centuries. And, consistently with loyalty to the law, but casting aside its misleading formulas and superstitions, there is no nobler service the lawyer, the law writer or judge can render his profession than to assist in this effort at the harmonization of the law, not with changed industrial conditions only, but with the new ideals that have resulted from such changed conditions in the reconciliation of collectivism and individualism.

Prof. Franklin Giddings, "Democracy and Empire," pages 71 and 76, says: "The individual is no longer the starting point of ethical systems. We return to the ideal of the ancient Greeks that

the complete individual, rational life itself, exists only in connection with the social organism. Aristotle said that he who can live without society is a beast or a god. There are few, if any, great truths of which the ancient philosophers do not afford us some glimmering, but our advantage is in the knowledge of the process by which biological and social changes are accomplished. The interpretation of man as a progressive ethical being, and the interpretation of society as an ever-changing plexus of relationships, must proceed together. * * * In society as on the street the preliminary duty is to 'move on.' The nation that has no further reconstruction to effect, no new ideals to realize in practice, has completed its work, and will disappear before the warfare, or the migration of more earnest men."

President Eliot of Harvard University said on a recent occasion: "The new ideal in American life is the idea of unity for the common good, individualism with collectivism, each to perfect the other. The first half of the 19th century saw the development of individualism, the last half of collectivism. * * * The new thought will come to fruition only through struggle, conflict and suffering * * * all calling for disinterestedness and good will." Actions once regarded as socially indifferent come to be regarded as moral or immoral when the general opinion comes to regard them as socially beneficial or injurious. But the ethic of the revolutionary 18th century was in the growth of individual freedom with which our law by reason of the political principles of our government is deeply imbued. The pendulum now swings the other way, to the extent at least of a modification of individualism by the recognition of the rights of collectivism.

The English and American lawyers and judges have with rare intelligence and devotion worked out a wonderful system resting upon the decisions of courts of last resort that must command the admiration of all who have a competent knowledge of it. There are probably now some 12,000 volumes of Reports. They present an intelligent disposition of the hundreds of thousands of particular instances that have arisen in the actual course of the ever changing combinations and relations in human affairs. The stimulus of the advocate and the responsibility of the judge and the restriction of the decision to the points presented and arising in actual transactions, furnish the highest possible guaranty for intelligent consideration and matured conclusions. If there is inevitably mingled in this vast storehouse much that is worthless, that is unsound and misleading, nevertheless, to the honor of the bar and the bench it remains one of the most magnificent features of Anglo-American civilization. If every evidence of our civiliza-

tion of the past 500 years should perish and there should remain only one set of the Reports, all of our institutions, social, religious and political, much of our science and philosophy, could be reconstructed from them by the "traveler from New Zealand." It is, nevertheless, true that, owing to change of social conditions and ideals adverted to, we are beginning to realize now that the want of adjustment between that portion of our law which should be developed by Judicial Decision and the accepted ethics of existing social conditions presents a most serious problem, and unless it is wisely solved the Reports will cease to reflect the civilization of the age, and law from having been the great conservator of social order will become its Procrustean bed.

It is not a problem, however, that may not be solved to the great honor of the bench and the bar of the country, but it requires for its solution not only the casting aside of formulas and superstitions that never were true, but the substitution in their stead of wider and deeper learning both by lawyers and judges. Too often the learned lawyer is learned in nothing but his law books—if, indeed, proficiency in them alone deserves the name of true learning. It is the rare exception when he is acquainted with the philosophy and the science of his own day or with the wisdom of the ancient world; and, if so, too often such tastes are indulged for his own private enjoyment and without any due conception of the relation that such acquirements should bear to his duties as advocate at the bar or judge on the bench. The inducements to confine himself to his law books are great indeed. He can not hope to master the case law in them in a lifetime. The field is inexhaustible. The lawyer is saturated with the belief that by such means alone can he gain cases; the judge with the conviction that by strictly confining himself to the paths marked out by his predecessors, he can always be assured of deciding, if not most wisely, at least in a manner free from outside criticism and acquitting him on his own technically educated conscience of responsibility.

Prof. Kirchway, Dean of the Columbia Law School, in an address at the session of the American Bar Association in 1904, said: "The times call for a more highly trained and better equipped bar than our present educational methods furnish; they demand that the lawyer shall be a man of discipline and cultivated mind and a sound knowledge of economics and social conditions and of the history of institutions; that he shall be so trained in the method and spirit of legal science that law shall present itself to him as an organized system of human experience, slowly unveiling to him the demands of an enlarging conception of justice and of a more

perfect adjustment of the changing conditions of social and industrial life."

Prof. Bryce, "Studies in History and Jurisprudence," page 690, speaking of the judges in England as the makers of law, and the remarks are, of course, equally applicable to judges in the United States, says: "The judge is always the voice whereby the people, the ultimate source of all law, shape and mould in detail the rules which seem fitted to give effect to their constant desire that the law shall be suitable to their ends, a just expression of the relations, social, moral and economic, which in fact exist among them."

In his inaugural lecture at Oxford he says: "The arguments that the study of the civil law will help to make English law more of a system and a science than it is now, and to train the individual in more philosophical habits of mind, proceeds upon the assumption that law ought to be a science and lawyers philosophical. * * * Science, like wisdom, is justified of all her children." After enumerating the advantage to inure to society from such a source, he adds: "The second benefit is the reflex effect upon the legal profession of a higher conception of the studies to which it devotes its labors. * * * The life of a lawyer, tedious and distasteful in some of its details, would be more enjoyable if his occupation called out, as it ought to do, the highest faculties of his mind; and the tone of the profession which will sooner or later be threatened here by the temptations which have begun to threaten it elsewhere" (referring to the United States) "will be best maintained in purity by a sense of the dignity of the subject it deals with as a department of philosophical inquiry. It is scarcely possible that a corrupt administration of justice can co-exist with an enthusiasm for the utmost propriety and elegance of law as a science, such as existed among the great jurists of Rome."

Judge Dillon, "Laws and Jurisprudence of England and America," says: "Scientific jurisprudence, already a necessity, will play a more important part in the future of our law than it has in the past. It is a mistake to suppose that the jurist, any more than the legislator, must look only to the past. He must also study the present, and bring himself into actual contact with the existing conditions of society, its sentiments, its moral convictions and its actual needs. And the work must be done with all the aids that the learning and the experience of the past affords, and under the inspiration of a higher ideal than the existing state of our law supplies. * * * No single laborer, unassisted, can do much in a work so vast. It is, indeed, a work which must be done more or less in compartments, and it is given to every earnest and

devoted lawyer to do in his day and generation his utmost part, however humble."

With all Blackstone's merits the value of his Commentaries as a basis of legal study in our law schools and offices is long since past, and unless the corrections exceed in volume the text, has become absolutely harmful. The qualifications needed to make such a work permanently useful are exactly those which, Hallam says, Blackstone did not possess, a knowledge of history and the philosophy of the law. Blackstone does not now belong to the study of the law, but to the study of the history of the law. It is not for the law student, but for the scholar who, while gleaning from it much of value, unconsciously corrects its errors.

When we speak of equity as having been invented for relief from the precedent forms of action and defenses, let us reflect that the true meaning of this expression is relief from the precedent decisions as to what those forms admitted of being given in evidence. It was from the inelastic nature of law as determined by Judicial Decision freedom was then sought in the realm of Natural Reason. If *stare decisis* has become as binding in equity as in the law, then no elasticity of decision remains to respond to new or more highly developed ethical conceptions except by a more liberal interpretation of the doctrine itself than has generally obtained.

Having regard to the average working rules of morality as actually enforced by society, not to those sanctioned merely by religion and high spirituality, our present conceptions of right conduct are both more "refined and stringent" than those of our ancestors of two or three centuries ago. And we think that the past gives us hope that the morality of our descendants may in turn be more refined and stringent than our own. (Giddings.)

Again, we require relief from the overshadowing influence of *stare decisis* as did our ancestors from the 13th to the 18th century when equity was being developed. Justice was then effected through equity by expansion, not of remedies only, but of rights and defenses, by the recognition of principles of civil conduct which the law ignored. If our jurisprudence, though with halting and hesitating step, still does, in some degree, advance with the more enlightened conscience of mankind, it is not by conforming with the rules and precepts adverted to, but in spite of them. In great social exigencies great men have always been raised up embodying all that is best in the spirit of the age and giving it expression, whether in morals, philosophy, social and political science, religion or law. The ablest lawyers and judges never have fallen under the paralyzing influence of these superstitions, but, both consciously and unconsciously, have risen superior to

them because their minds were instructed by philosophy, history and science, their consciences by religion and the love of humanity, that their natural reason might more truly apprehend and apply the law. It was so in the Granger cases, where it was declared by the Supreme Court of the United States, in 1876: "When the owner of property devotes it to a use in which the public has an interest he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. The Chicago grain warehouses, by reason of this situation, are thus affected with a public interest, and the Illinois Act of 1872, regulating the maximum charges therein, is a valid exercise of the public power." Again, when by the same court it was declared in *Fosdick v. Schall*, in 1878: "Upon application of mortgagees for receiver, pending foreclosure, the court may, in its discretion, direct payment out of income, of debts for labor, supplies and permanent improvement of mortgaged property."

It is idle to attribute these decisions to new conditions. They enounced a new ethic in the law, the recognition of the rights of collectivism and an effort at the reconciliation of such rights with the rights of individualism. Neither would have been made twenty years earlier.

But it is the average lawyer and the average judge who unite to make by Judicial Decision the great body of our law. The effort should be by the absorption and expression of changed social ideals to avoid rather than promote judicial legislation in great social crises. The implication of law with morality makes imperative the correspondence of standards of civil conduct regarded by both.

As the vast number of the decisions but recently gave rise to the demand for their collection and arrangement in such shape as to be available, resulting in the cyclopedias, encyclopedias, annotated cases, etc., that have reduced this "unwieldy bulk" with which our predecessors had to labor to such a system as that it can now be conveniently handled, so, too, will higher education among lawyers and judges in those branches of knowledge that will better enable them to apply Natural Reason to the explication of law, and a correspondingly wise limitation of *stare decisis* give rise to a demand for such a compend of our jurisprudence as has been above outlined, as well as corresponding treatises on the several great branches of the law, containing all that is best and most worthy of preservation in the decisions, or to commentaries or institutes based on them according to the law of the survival of the fittest.

Comparative jurisprudence, ethics, social science and philosophy should not only form a part of legal study in preparation for the bar, vivifying and illuminating its maxims, rules and precepts, and relieving the youthful mind from a sense of their some time apparent harshness and arbitrariness, but their cultivation should continue throughout professional life to furnish the true atmosphere and perspective in which such maxims, rules and precepts should be viewed by the enlightened jurist, a source to which he may ever turn for the light that will not fail.

The development of our law as a science should progress by Judicial Decision; political legislation intervening only for the readjustment of private rights where the courts, by reason of the just application of the doctrine of *stare decisis*, their regard for previous decisions, "not despotically to govern, but discreetly to guide" (Sedgwick), are unable to respond to the new adjustment required by a more refined and stringent ethical sense; but the occasions for such necessary intervention will be diminished and the scientific development of the law increased as the application of the doctrine is properly limited by a judiciary instructed in the philosophy of the law, enlightened by the wisdom of the ancients and by the knowledge of moderns in all that pertains to the rights and obligations of social life.

To my mind, the statement that the function of the courts at present is only to apply principles already settled and determined to new conditions, implies that the chief qualification of the lawyer or judge to be exercised is that of a certain sort of mental dexterity that will enable him to unravel all the intricacies and complexities of modern transactions, reduce facts to their greatest simplicity, and transfix them with some ancient precept. This, with respect to a transaction of today involving new social problems that have arisen out of new social conditions, a lawyer or judge of the 18th century might do as well as one of the 20th. It is a mechanical process to the trained legal mind; an invaluable, but not an all-sufficing one.

Does anyone believe we are progressing to a state of greater certainty than now exists? Ignorance and indolence delight in formula. True progress is only effected through high intelligence and more refined ethical standards, and its peculiar province is in the discovery of just distinctions and their consequences, a process that must ever be continuous, with ever-increasing variations. This is itself a truth that was unknown and impossible of appreciation in the remote past, when the doctrine of *stare decisis* was announced and enforced with a stringency that has left so deep an impression on our system. That it was appreciated in a meas-

ure in the later development of equity jurisprudence is seen in the reluctance of those courts to accept the doctrine with all the despotic force with which it obtained in courts of law. And now when the blending of law and equity with us as completely as in the Roman and civil law is so clearly foreshadowed that we can foresee the coming of the day when their study as distinct systems will belong only to the history of the law, the doctrine should be applied, without distinction between questions of law and equity, in the modified sense recommended by many of the ablest among the earliest writers and judges as its proper force in equity. Precedents illustrate principles, show how they have been applied, and guide, limit and restrain, but ought not despotically to control future decision.

We have proclaimed a false ideal, Certainty: a high one truly, but not the highest and therefore not high enough for the noble science of the law. We have pursued it in vain. It still eludes us. Meanwhile, though not with as unfaltering step as had we not been deceived by this *ignis fatuus*, we have been making great strides towards the only true goal. Had we not sacrificed the higher ideal to this false god, will any say we had achieved less certainty? Or deny that we had maintained greater harmony with social conditions through responsiveness to higher intellectual views and a tenderer conscience? Then, for stimulation and encouragement, for honor and dignity, for the lofty enthusiasm that comes from the pursuit of the highest and for the consolation that awaits even partial defeat in high striving, let us acclaim the law's true ideal, *Justice*—"Justice, the constant and perpetual wish to render every one his due." (Justinian.)

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TRADE MONOPOLIES AND THEIR LEGAL RESTRAINT.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

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There seems to be no period in history since men were condemned to labor for their bread when private property was not in some way recognized. And when they were required to labor for the means of living, it was natural for each individual to claim for his own all he discovered or produced, and none could well deny that he who labored ten hours a day should fare better than he who labored but six. We find this right not only claimed but exercised by the individual and conceded by others in the earliest periods of organized society. The exclusive right of Esau to all the venison he could take was as well recognized as that of his brother Jacob to his flocks and herds.

It is said by Grotius that when people began to emerge from a state of nature the most effectual way of securing peace was by introducing an exclusive property. As by this means the extent of each person's claim is ascertained and the particular share out of the general stock which belongs to him is settled and he could have no just grounds for quarreling with others for taking more than they should have whilst they let his property alone; and they, on the other hand, could have no pretense for hindering him from using and enjoying what he had a right to use and enjoy exclusive of them.

But it is impossible to conceive of the exclusive ownership of property unaccompanied by avarice and greed, prompting individuals to efforts to acquire more than a fair reward for their labor. To quote from the same author: "Supposing the reasons

for introducing this change to have been rightly assigned, we should look for the origin of property amongst them whose wants were the greatest; who were the most scantily provided for, and who were least likely to practice the duties of benevolence and equity towards one another."

Pharaoh's prime minister, Joseph, by means of his power of interpreting dreams, cornered the grain market in Egypt. He knew a time was near at hand when production would stop, and while the supply lasted he got possession of practically the entire stock; and during the famine he exchanged corn first for all the money and then all the livestock and land in the kingdom; and afterwards rented out the land to the former owners at one-fifth of each annual crop.

Aristotle in the *Politics* gives several instances of the creation of monopolies before his time by men of unusual intelligence. He reports that Thalese, the philosopher, was reproached for his poverty to show that philosophy was of no use. But being an astronomer, through his knowledge of that science, Thalese knew beforehand that a great crop of olives would be produced, and to show his critics that he was poor only because of his contempt for riches, he leased in advance all the olive presses, and when the harvest came on he rented them out at his own price and made a great sum of money.

It is related by the same author that a citizen of Sicily, by buying up all the iron, was able to fix his own price, and sold it at a profit of 200 per cent; and that Dionysius, the King, allowed him to take his money, but ordered him to leave Syracuse, because he thought the man had discovered a way of making money that was injurious to the royal interests. And concludes by saying that statesmen ought to know these things; for a State is often as much in want of money and of such devices for obtaining it as a householder, or even more so; and, hence, some public men devote themselves entirely to finance.

The Hebrews, when they established their government after leaving Egypt, enacted many wholesome laws to prevent monopolies and for the protection of the poor. They had fled from oppression and slavery, and, as a people, were strongly inclined towards free institutions, and had at their head the greatest law-giver of the period, if not of all time. Perhaps the best law passed by them to prevent monopolies was the one prohibiting the alienation of land for a longer period than fifty years. This law establishing the Year of Jubilee with its incidents seems to have worked well under the Mosaic institutions for many generations. It was evidently enacted with a better conception of the needs of

the occasion than our Anti-trust Law. It accomplished every purpose of its authors; its terms were sufficiently simple to be understood by all classes; its construction resulted in no dissenting opinions or adverse criticism.

There were many offenses against fair trade known to the common law of England, all subjecting the offender to severe punishment. To meet one on the way to market and buy his merchandise or products, or to dissuade him from bringing them to market, or to persuade him to enhance the price, was called forestalling. To buy corn or food products to sell again in the same market or within four miles was called regrating. Blackstone says: "Engrossing was described to be the getting into one's possession or buying up large quantities of corn or other dead victual with intent to sell them again. This must, of course, be injurious to the public, by putting it into the power of one or two rich men to raise the price of provisions at their own discretion."

In the case of *The King v. Waddington*, decided by the court of King's Bench in 1801, and reported in the first volume of *East's Reports*, the defendant was a wealthy merchant and dealt in hops. After making heavy purchases, he tried to bull the market, for which he was convicted and punished. The transaction was amusingly small compared with some of the deals of the modern cotton and grain speculators. The court, in passing sentence, said: "The sum, then, of the offense is that the defendant, a merchant of credit and affluence in Kent, having a stock of hops on hand, went to the market at Worcester, not to buy hops, for that he disclaimed, nor to sell them, for upon the evidence it appears that he did not offer any for sale, but merely to speculate how he could enhance the price of that commodity. And for that purpose he declared to the sellers that hops were too cheap, and to the hop planters that they had not a fair price for their hops; and lest he should be defeated in his speculation to raise the price of a falling market, he contracted for one-fifth of the produce of two counties, when he had a stock on hand and admitted he did not wish to purchase." Although some American text-writers treat forestalling, engrossing and regrating as crimes under the common law, I have found no American case where punishment for these offenses has been inflicted, and I doubt if there was ever a time when the courts of this country would have held acts of this kind, falling short of a conspiracy to defraud, to be criminal.

And in England they seem to have lost their force as more liberal ideas of the right of free trade were developed, and the acts for which Waddington was fined have for many years been regarded as innocent puffing and have ceased to be regarded as crimes.

Despite the common law and many acts of Parliament the Kings of England for a long time exercised the prerogative of creating monopolies by royal grant. The practice reached its height and began to decline during the reign of Queen Elizabeth. Being unable to properly reward all who had distinguished themselves in her service, she discharged the obligation by granting monopolies of almost every commodity then in use. When the abuse had become almost intolerable the sagacious queen canceled the patents before Parliament could act, and thus secured the good will of her favorites, by making the grants, and of Parliament and the people, whose burdens she subsequently relieved.

From 1603, when James I. succeeded Elizabeth, to the accession of William and Mary in 1688, the power to create monopolies by royal grant practically ceased to be recognized as a part of England's system of government. The royal prerogative was lost during this period, partly through the incapacity of the Stuarts, but contributing more than all other causes were the spirit of the age, the increase of education, and England's sudden and rapid growth as a commercial nation. The details of these changes can not be developed in this paper, but must be looked for in the histories of the period.

The statute of Edward VI., enacted about the year 1550 and repealed about 1772, was much like some of our recent anti-trust laws. It is the only ancient law I have found that punished parties to agreements fixing prices. By its terms, those who entered into agreements or conspiracies to raise the price of commodities, for the first and second offense might be punished by fine and imprisoned on a diet of bread and water; and those convicted of a third violation were to stand in the pillory, lose one ear and be forever infamous. It seems not to have been enforced to any considerable extent in England, and that it remained unrepealed so long was probably attributable to the fact that it was forgotten. Its doctrines had no solid lodgment in the institutions or public opinions of this country until introduced by our statesmen a few years ago.

The views of American writers upon laws of this kind are well expressed by Mr. Wharton in the 8th edition of his *Criminal Law*, published in 1880, in which he says: "The old law in relation to business combinations was an outgrowth of the old system of political economy, and of the theory of State supremacy, which was essential to the maintenance of that system. * * * Though we may not hold absolutely that the State has no right to intervene to settle prices of labor or produce, we must assert that it has no right to make such settlement by means of common-law criminal prosecution. * * * I am entitled to sell either my labor

or my capital for what I can get; and if I can do this without penal liability when acting by myself, I can do so without penal liability when acting with others."

The Supreme Court of Rhode Island, in a case decided in 1894, said: "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. * * * It would cut off consolidations to secure the advantages of united capital and economy of administration. * * * There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But co-operations for mutual advantage which do not amount to a monopoly, but leave the field of competition open, are neither within the reason or operation of the rule."

The Supreme Court of California, in a case decided in 1896, said: "Combinations between individuals or firms for the regulation of prices and of competition in business are not monopolies and are not unlawful as in restraint of trade so long as they do not include all of a commodity or trade or create such restrictions as to materially affect the freedom of commerce. * * * The old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions as the laws of trade have become better understood during the development of our commercial system and the changes which have been introduced in the social system."

Reasons existed for a law prohibiting agreements fixing prices in England in 1550 that subsequently disappeared there and have never existed in this country. Owners of wealth did not then consider commerce or labor honorable callings. Commerce was in its infancy, labor-saving machinery almost unknown, and skilled mechanics so few that it became necessary to pass laws prohibiting their emigration. With the capital of the country invested in non-productive landed estates and its owners engaged in the feudal duties of domestic and foreign wars, and business corporations unknown, private monopolies could not well be created except by agreement between traders; and the number of persons engaged in trade was sufficiently limited to make combinations of that kind apparently possible. But the conditions that called for the enact-

ment of the law of Edward VI. ceased to exist in England centuries ago and never existed in the United States.

Commerce and trade are not now like they were in the 16th century, in the hands of a few comparatively poor traders, who could only control markets by mutual agreements; but the business of the country is now and for many years has been conducted by men of great wealth or by business corporations still more wealthy. These great business concerns in Arkansas and elsewhere have frequently of late years monopolized local markets, but not by agreements with others to fix prices. They destroy business rivals instead of agreeing upon a scale of prices. If one of them is engaged in selling, it sells in the rival's territory below paying prices, making up the loss in other localities, until the rival is forced out of business, when prices are put up and maintained without competition. If the parties are engaged in buying, the method is reversed, the big concern enters the rival's territory and pays more than the commodity is worth until the desired end is reached.

To destroy a business rival and secure a monopoly by buying products at more than their value is not prohibited by the Arkansas Anti-trust Law. By Section 1 of the present law, passed in 1905, it is made criminal to enter into agreements fixing prices or limiting production. And Section 6 of the act makes it criminal for those engaged in the manufacture or sale of produced, mined or manufactured articles to sell at less than cost for the purpose of driving out competition or of injuring competitors. It does not include sales unless below cost, nor purchasing at any price. A corporation sufficiently wealthy to resort to such methods, with the advantages inherent in the possession of great wealth, would not have to sell below cost to destroy a less fortunate rival. I believe that no benefit can result from an enforcement of the act in its present form. Section 6 is aimed at an existing evil, but as it includes none but those who sell below cost it will remain a dead letter. I believe that Section 1, which makes highly criminal all agreements between corporations, firms or persons fixing prices or limiting production, to be based upon ideas wholly inapplicable to the present conditions of this country, and that its enforcement would result in harm rather than good. A very large part of the business of the country is done by corporations. A foreign or domestic corporation doing business in this and other States or foreign countries, if a party to an agreement in those countries, however legal there, would become a lawbreaker here, though engaged in the sharpest competition, or it would have to leave the State, thus decreasing competition. This idea is well expressed by

Judge Wood in *State v. Lancashire Ins. Co.*, 66 Ark., 478, decided under the former act, where he said: "Now suppose that the member of the pool or trust in the foreign State proposed to do business and did business in Arkansas on a strictly competitive basis which tended to cheapen and lower insurance to the people of this State, could any dispassionate lawyer say that the Legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not."

But by Section 1 of the Act of 1905 the Legislature did "punish such beneficial and commendable deeds." In *Hartford Ins. Co. v. State*, 89 S. W. Rep., 45, the opinion of the Chief Justice closes in this language: "It is held that the State has declared, and possesses the right to declare, that a foreign insurance company can not do business in this State while belonging to a pool, trust, combination, conspiracy or confederation to fix or effect insurance rates anywhere."

The most fatal objection to the act is that public sentiment does not demand and would not tolerate its enforcement against all who violate it. It is well known that a large number of our best citizens in the last two years have made agreements to limit the production of certain farm products and to hold such products until a fixed price is obtained. These agreements have been made by both merchants and farmers. No purpose to prosecute these good citizens has been expressed by any public official, as far as I know, nor do I know of any candidate for public office announcing a purpose of prosecuting them. To do so would be a courageous act, but could not be said to be a wise one. It is certainly unnecessary to elaborate argument to show the impolicy of a law so little responsive to public opinion that it can be enforced against but a small minority of those who violate it.

I do not regard an agreement fixing prices as necessarily harmful. Should a number of merchants agree to fix the prices of goods to be sold to their customers, if the prices agreed upon were reasonable and not enhanced by the agreement, no harm would be done. If unreasonably high, independent competitors would undersell them and destroy their trade. To state this is but to state an elementary principle of political economy. The contention that agreements fixing prices destroy competition and result in monopolies is not true, unless the whole of a single line of business can be brought under the terms of the agreement, which is impracticable, if not impossible, at this time as to all classes of business open to the general public, and those alone are included in this paper.

It is said that agreements fixing prices tend to put large amounts of capital under single managements. I answer that large business

enterprises have not proven detrimental to public or private interests, except in rare instances, and then for want of proper legal restraint. And the tendency of the times to aggregate capital under single managements could not be restricted by prohibiting agreements fixing prices. There is no limit to the amount of the capital that might be put into a single corporation. Neither the Anti-trust Law nor any other law in this State fixes or limits the amount of capital stock that may be put into a business corporation. And there are private fortunes in all sections of the country large enough to enable their owners to control local markets in the way indicated. It would be unwise and impracticable to prescribe a maximum for the capital stock of business corporations, or to limit the amount of private fortunes. Large business enterprises when fairly and honestly conducted are beneficial to the country, and as long as our present theory of government lasts we must allow the citizen to own all he can honestly acquire. I can see no middle ground between unlimited private ownership and socialism with all of its incidents. I believe the Legislature could furnish a fairly effective remedy for present trade evils by the enactment of a law making it an actionable wrong for a corporation, firm or person, willfully, and for the purpose of injuring a business rival, to pay more for a commodity than it is worth, or sell for less than its value, making such wrongdoer liable for exemplary damages in an action brought at the domicile of the injured party. Competition should be allowed and encouraged. The advantage that wealth gives should be freely accorded, and the great corporations or wealthy individuals or firms should be allowed to undersell or outbid their less fortunate rivals as long as they act in good faith in legitimate business; but where competition ends and fraud and malice begins, the law should intervene and furnish a remedy.

I am unable to agree with the contention that there is a present tendency towards the aggregation of capital and to create monopolies that constitutes a crisis in our affairs, though I believe the rapid increase in wealth throughout the United States and the development of new and enlarged business enterprises have created real and suggested imaginary economic problems somewhat in advance of their intelligent solution. And if I believed that such a crisis existed, I should hope for but little relief from the enactment of statutes by the Legislature. A Legislature may wisely enact laws to preserve order and to protect private rights, but I believe the business affairs of the country have prospered most when least restrained by statutory regulation. That the country has for many years been fairly prosperous I believe may be attributed to the small influence of legislative enactments upon the great

economic questions of the times. The business of the country refuses to respond to the legislative fiat. Good or evil may result for a time from the enforcement of a statute, but in the end so much and no more will be enforced as responds to the aggregate of public opinion. The remainder will not only not be enforced, but will by non-enforcement finally cease to be regarded as a part of the law.

Blackstone, speaking in the Commentaries of this tendency to change in the law without Parliamentary action, said: "Though, upon comparison, we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which the alteration occurred, any more than we can discern the changes of the bed of a river which varies its shores by continual decreases and alluvions."

Gibbon, the historian, speaking of the laws of the empire, said: "To define the ambiguities, to circumscribe the latitude, to apply the principles, to extend the consequences, to reconcile the real or apparent contradictions, was a noble and important task; and the province of legislation was silently invaded by the expounders of ancient statutes. Their subtle interpretation concurred with the equity of the prætor to reform the tyranny of the darker ages; and however strange or intricate the means, it was the aim of artificial jurisprudence to restore the simple dictates of nature and reason."

A study of our own legislation and the decisions of our courts in this connection would not be without interest.

In a digest of the laws of the Territory of Arkansas published in 1835, there is a section purporting to have been passed in 1808 by which it was enacted that if servants or children resist or refuse the lawful commands of their master or parents, it should be lawful for a justice of the peace to send them to jail or house of correction, there to remain until they humbled themselves to the master's or parent's satisfaction. And for assaulting such master or parent they should be whipped not exceeding ten stripes.

This statute was probably never repealed, but it has not been treated as in force for more than fifty years.

By the terms of the charter granted by the Legislature in 1853 to the Cairo and Fulton Railroad Company, its employees were exempted from labor on public roads. In 1874 the St. Louis, Iron Mountain and Southern Railroad Company was formed by the consolidation of the Cairo and Fulton with another company. In *Zimmer v. State*, 30 Ark., 677, decided in 1875, the Supreme Court held that the new company succeeded to the charter rights of the old, and that its employees were exempt from road duty.

I believe that no such claim is now made by the employes of that company, and I am quite sure that if made it would not be sustained. In 1883 the court, in *St. Louis, Iron Mountain and Southern Ry. Co. v. Berry*, 41 Ark., 509, held that the company had not succeeded to the charter right of exemption from taxation conferred upon the Cairo and Fulton Railroad Company, and, referring to *Zimmer v. State*, said: "We attach no importance to the extrajudicial remarks of the judge who delivered the opinion in *Zimmer v. State* to the effect that this consolidation was effected by virtue of a charter provision and that the St. Louis, Iron Mountain and Southern Company had succeeded to all the rights * * * of the Cairo and Fulton Company." I think it would have been better for the court to have expressly abandoned the *Zimmer* case as an authority than to suggest an apparent distinction rather than surrender the State's right to tax private property.

The question of taxing a consolidated company claiming charter exemptions was disposed of in *Arkansas Midland R. R. Co. v. Berry*, 44 Ark., in 1884, in the following language: "If the Midland company, to which the exemption is granted, subsequently became consolidated with another company, thus forming a new corporation, then the Midland company is dead and the exemption is extinguished." The court in neither case was subjected to criticism. Prior to 1868 there was no constitutional prohibition against legislative exemption of corporations from taxation. Public opinion endorsed such legislation. It was doubtless at the time founded in a wise public policy and hence charter rights were treated as contracts and liberally construed by the courts. But when corporations begun to increase and refine upon and multiply claims of immunity from ordinary burdens of government, to meet new conditions, it became necessary to invoke the rule that burdens should be equal and statutes or charters conferring special privileges should be strictly construed. Influenced by public opinion economic conditions will remain stationary or change independent of legislative action. These conditions, their changes either to improve or grow worse, and the public opinion that promotes them will but reflect the character of the people; and safety from abuses will depend upon the people's intelligence and integrity rather than upon the terms of particular statutes.

Bold speculators in justification of new theories tell us that modern research has made discoveries the mere mention of which a few centuries ago would have brought in question the sanity if it did not endanger the personal safety of the most enlightened searcher after truth. They say, perhaps truthfully, that Galileo could not have safely declared the possibility of the telephone.

But they who seek to prove the soundness of their views by telling us that reforms have often been unpopular may be reminded that at the time the opinions of Galileo and Newton were being ridiculed by an unthinking public, a numerous and popular class believed in the existence of the Philosopher's Stone and confidently taught principles of science and government that have served no useful purpose except as evidences of human fallibility.

LAWLESSNESS AND LAWYERS.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 11, 1906,

BY

JUDGE SELDEN P. SPENCER,
OF ST. LOUIS, MISSOURI.

I am indeed conscious that the honor of meeting with the Bar Associations of Texas and Arkansas is not at all due to any legal learning which I am competent to communicate to you, but rather is it the fruit of a delightful personal friendship with your President and the chairmen of your Executive and Legal Education committees, and I can not refrain from expressing the real pleasure which I have in attending this meeting, and I may say that the subject which I have selected, "Lawlessness and Lawyers," can, in my judgment, have no better place for its presentation than in the Southern States of our Union, where the commercial spirit of the age in its avarice and greed has as yet the weakest hold upon our profession, and where it is still remembered that "Happy is the man that findeth wisdom, and the man that getteth understanding. For the merchandise of it is better than the merchandise of silver, and the gain thereof than fine gold."

It is the South that gave us Thomas Jefferson and the Declaration of Independence; James Madison and the Constitution; and John Marshall, the interpreter thereof; a mighty triumvirate of lawyers, without whom, humanly speaking, constitutional law could never have existed, as it does, in this land.

There is a lawlessness of evasion as well as of violation; a lawlessness that seeks, and too often secures, the sanction of the lawyer; that is the burden of my theme.

In this day the disregard of law most dangerous in these United States is not the crime of the brutal criminal who robs or murders or burns; for watching him with constant vigilance are the officers

of the law, empowered to arrest at once on the commission of the crime, and, moreover, the evidences of his criminal act are so open and the evil effect upon the community so immediate that from the moment of the wrongful act, if indeed not before, the criminal himself becomes an outcast, hiding and hunted. Concerning this class of crimes in general, confined, as they are, to the ignorant and the degenerate, to those who are without either moral, social or financial responsibility, I have at this time nothing to say.

The lawlessness—none the less dangerous—to which I direct your attention is that disregard of law on the part, perhaps, of those who are of gentle birth; who have had the advantage of a liberal education; whose fortunes have been accumulated and preserved by virtue of the power of the very law which they despise; of those who with righteous indignation would proceed, as to a public duty, against the common thief or thug, who may have deprived them of their money or trespassed upon their persons or property. There is a treachery in the time of war, and the guilty traitor is promptly hung. There is as well a traitor in the time of peace; he it is who by his speech or counsel or conduct debauches the law of the land.

NOT THE EXCUSE OF IGNORANCE.

Lawlessness such as forms the subject of this paper has not the excuse of ignorance; it is conceived in selfishness and greed, and is too often brought forth with legal midwifery, and is possible only because of and where exists a low regard for the dignity and power of the law on the part of those who are either the immediate transgressors or on the part of those who, mainly of our profession, by counsel and assistance, abet the crime.

The lawlessness of evasion exalts gold above character, and is more concerned about the amount of gain than with the manner of its getting. It regards law not with respect, but rather as the burglar views the lock that separates him from his loot or locates the watchman that awaits his egress—as something to be overcome or avoided.

LAWLESSNESS OF GREED.

Strange as it may seem, this lawlessness of greed believes in the strict enforcement of the law against the unfortunate or the victim of evil association and protests violently against leniency in such cases in either prosecution or pardon; but when the law comes in conflict with the lust of gold, or is invoked for the protec-

tion of the people, either to prevent restraint of trade or to restrict monopoly in regard to articles generally used, or to prohibit discrimination in favor of the rich and powerful and against the weak, or to enforce the assessment and payment of taxes, in an instant the law thus invoked has lost its majesty and is alleged to have become at once an instrument of oppression, to be resisted or evaded by every means which money, friendship, brain or technicality can suggest.

NO EXTRA FAVORS FOR THE RICH.

In this land of ours, where every citizen—as the Supreme Court of the United States has put it—is a constituent part of the sovereignty itself, the man who earns his living with his hands has the right to expect and to demand that every corporation engaged in quasi public business shall transport people, for example, or freight, or accept employment from all who desire it, at the same price and on the same terms for one as for the other, and that merely because a shipper or trader may be rich or powerful he should not be allowed greater favors, or be repaid moneys advanced for freight, or be allowed reduced rates which are not as well open and known to everyone who has need of this public service, and his right to thus expect and demand in principle is as firmly and righteously established as is the right of him who has acquired a fortune to expect and demand that it be preserved from theft or trespass.

Laws preventing discrimination in freight and passenger rates that apply to railroads; laws concerning mercantile and manufacturing companies that restrict dangerous combinations or prohibit unfair monopolies, or regulate the payment of capital stock or the operation of the business of the company; laws that provide when and how arrests may be made or property seized; laws that prohibit false testimony or collusion either to secure licenses or to obtain decrees or to evade taxation, and that thus give force to the oath which binds the taker not only to tell the truth, but to tell the whole truth and nothing but the truth, are all laws clad with the same majesty, deserving of the same respect, entitled to the same enforcement as are the laws upon the statute books concerning murder or rape or arson.

The difference is one of degree, not of principle; both, merely because they are laws, if for no other reason, have a right to respect and enforcement.

LAW AGAINST REBATES.

There is a law against rebates, direct or indirect. The railroad must ship for anyone a carload of meat at the same price for which it will ship to the same destination a carload of similar merchandise for any other shipper. The law is equipped with penalties. What can be said in defense of the practice, now admitted, whereby all bills of lading for similar shipments bear, it is true, upon their face the same amount of freight, but where the favored shipper finds on his desk, or in his mail the morning after the shipment, a sum of money without evidence, it is true, as to what account it is to be credited, but with its source and purpose well known to the recipient. Or what can be said of that other practice by which the meat packers, owning their own cars, were charged, it is true, the same price for the shipment of a carload of meat that the independent butcher was charged, but who in fact were paid a rental for the use of the car three times what would have been charged by or paid to any other railroad or car company for the use of a similar car, and which resulted, therefore, by a simple subterfuge, in a mere reduction of freight charge to the favored shipper.

That the attempt to evade or disregard is constantly made, and often boastfully, and too frequently successfully accomplished, needs no proof—*mirabile dictu*—before a company of lawyers.

REGULATION OF RAILROADS.

For over forty years of their history the railroads of this land have been free from regulation on the part of the State, and for over fifty-seven years free from regulation on the part of the Federal Government, and so long accustomed to unbridled license it may be natural enough, but it is no less wrong, for them to believe that their rights are infringed when regulation is proposed, and that, therefore, they may evade and disregard the law, and they may yet have to learn by a more bitter experience that in our jurisprudence there can not be a vested right in a wrong. Nor less ridiculous is it for them to vehemently assert, when seeking either reduction in taxation or a greater exercise of the right of eminent domain, how public is the character of their service, and how useful and servient it is to the people, only to deny with even greater vehemence that same public character of service when State or Federal regulation or supervision is suggested.

They are like Sir John Fortescue, who, when Lord Chancellor during the War of the Roses, wrote an elaborate treatise to

support the House of Lancaster, and who, when Edward was at length firmly established on the throne, secured his pardon only by writing an equally elaborate and conclusive treatise in support of the House of York.

BANKS OUT OF POLITICS.

Better far were the banking institutions of this land advised by our profession. Once they were active in politics, opposing by every means in their power any attempt to regulate or supervise them. "Credit," said they, "is too fragile a thing for publicity."

They are now where every public or quasi-public corporation ought to be, out of politics, obedient to the law, and prospering under the very regulations which once they fought, and which by reason of their acquiescence have developed, not into a whip to punish or drive them, but, as the result of conference and consent, into a means to increase their stability and usefulness.

Aside from the lawlessness of the act, it is myopic in the extreme to attempt to evade or to disregard such law, for every evasion, often successful though it be, in due time brings sterner regulation, until the people, justly indignant at repeated violation, are apt to exact laws overharsh in the effect of their operation, but which are caused entirely by the lawlessness of those whom they affect. A stream can oft be guided and its channel changed to accommodate the wish of an abutting owner, but woe be to him who attempts to resist the steady flow that for the moment seems so powerless. The very hour of his seeming victory, as he looks at the obstruction that for the time has stopped the river's course, brings him nearer to his overthrow.

It were well in these days if the burning demand of Cicero in his arraignment of Catiline could be enforced in regard to the laws of the land: "*Sit denique inscriptum in fronte unius cuiusque civis quid de republica sentiat*"—and that there might be written in letters clear enough for all to read what every citizen thinks concerning the enforcement of law.

AN EXALTED PROFESSION.

My brothers of the bar, ours is an exalted profession; next to that vocation which has to do with the eternal welfare of mankind and which brings "good tidings of great joy which shall be to all the people" is to be ranked the calling to which we have devoted our lives, and that has to do with the life and liberty as

well as with the property of mankind. Those great words of Thomas Hooker are true today: "Of law, it must be acknowledged, she hath her seat in the bosom of God; her voice is the harmony of the world. All things in heaven and earth do her homage. The very least as needing her protection and the very greatest as not exempt from her power." It may be that, in verse or satire, as in the days of superstition and ignorance or in the fantastic schemes of visionary writers, the lawyer has been, as indeed he is often in this day, held up to ridicule or persecution.

When the Germans exterminated Varus and his Roman legions they cut out the tongues of the advocates and sewed up their mouths in order that, as they said, the vipers might cease to hiss.

LAWYERS IN HISTORY.

The barebones Parliament called lawyers the "Sons of Seruaiah," and suspended for a month the High Court of Chancery, which escaped absolute abolition only by the casting vote of the speaker.

Peter the Great, when in England, was taken to Westminster Hall, and curiously inquired who were those in black robes who talked so much. Upon learning that they were lawyers, he remarked: "I have two in my empire, and when I return home I will hang one of them."

Jack Cade, the Irish rebel, when he had possession of London in 1450, said: "The first thing to do is to kill all lawyers."

Coleridge in his "Thoughts of the Devil" writes: "He saw a lawyer killing a viper on a dunghill hard by his stable. The devil smiled, for it put him in mind of Cain and his brother Abel."

Tennyson speaks of the

"Lawless science of the law;
That codeless myriad of precedent;
That wilderness of single instances,
Through which a few, by wit or fortune led
May beat a pathway to wealth and fame."

Shakespeare says:

"In law what plea so tainted and corrupt
But, being seasoned with a gracious voice,
Obscures the show of evil."

Plato in his "Republic," Moore in his "Utopia," and Edward Bellamy in his "Scheme of Government," all relegate the lawyer to either obscurity or disgrace. But in the great events of life—

in the hour of the Magna Charta; in the day of the Bill of Rights; in the formation of our own Declaration of Independence and Federal Constitution, of which Gladstone said it is "the most wonderful work ever struck off at a given time by the brain and purpose of man," and more important yet in the years of its interpretation and enforcement, the lawyer has been the brain and character and power that has made these great achievements possible.

Governor Colden wrote to the British Crown when the subject of taxation without representation was the righteous plea of an outraged colony that "the lawyers are the authors and conductors of the present sedition," and when that "present sedition" had in the providence of God developed into a free and independent nation, power was given to the lawyer greater than to any other calling in the administration of government.

LAWYERS IN THE LEGISLATURE.

In the Legislature the lawyer always has been and always will be prominent and in the executive department of government he has ever held a high place, for every President of these United States, with but one exception, has either been a lawyer or a soldier, or both, and out of twenty-five Presidents, nineteen of them have been lawyers.

In the acquisition of territory, in treaties with foreign nations, in laws that involve great questions, constitutional or political, the lawyer, both as legislator and executive, has held commanding positions. But in the judicial department of government the lawyer is supreme, for when the lawyers as advocates have presented their respective views upon the question at issue and the lawyers as judges have finally, in a court of last resort, decided the question, no power on earth, either legislative or executive, can alter or destroy the ruling.

New laws may necessitate different decisions, but these new laws in turn come before the same legal tribunal for final approval. One of the three great divisions of government is thus confined exclusively to our profession.

POWER VESTED IN BAR.

Such power is vested in the bar in no other country upon earth. In some an hereditary body of peers, perhaps without legal training, have the power of final decision in matters criminal and civil;

in others the court and the advocates as well are the creatures and the tools of their royal rulers; with us no man can even enter our profession without the approving judgment of those with whom he seeks to be associated; and with us alone, through every step of the way, from the first proceeding to the final decision, is every question concerning the life, liberty and property of mankind, in both civil and criminal litigation, subject to the lawyer, and to him alone for determination.

And more than this, so well satisfied have the people been with the fair exercise of the power vested in the bar by the Constitution that of the fifteen amendments adopted only one (the eleventh) is any limitation upon the judiciary, and that limitation had its origin not in lack of confidence in the courts, but in the pride of State which sought to prevent any sovereign State from being the defendant "in any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any foreign State"; and to the glory of our profession may it be said that of the large number who by appointment or election have been called to sit upon the bench, Federal or State, appellate or *nisi prius*, they have each, with exceptions so rare as to need no comment, upheld the dignity of the profession by the impartial and honest conduct of their office.

LAWYERS DIFFER.

They have differed in ability; of some of them, as of Chief Justice Marshall, it might be said, as Mr. Justice Buller wrote of Lord Mansfield: "Certain judgments of his are of such transcendent power that those who knew them were lost in admiration at the strength and stretch of the human understanding"; of all of them with pride it can be said (and it is a tribute to the profession from which they are chosen) that their judgments were ever above personal influence and never intentionally in violation of right or justice. Well may John Adams have written: "At the bar is the scene of independence. Integrity and skill at the bar are better supporters of independence than any virtue, talent or eloquence elsewhere." And true is the observation of Mr. Justice Miller in the *Garland* case: "Lawyers are by the nature of their duties the molders of public sentiment on questions of government."

THE COUNTRY LAWYER.

The lawyer of today, the true lawyer, true to the history of his profession, to its high purpose and its noble aim, is the man,

found more often in the town and country than in the city, who counsels and pleads for what is right, not for what is only expedient or desired; who can always be found ready to assist in the preventing or remedying of wrong, never in the accomplishing of it; who regards his duty to God, to his country, to his profession, as above purchase; who acts for his clients' rights, not as their hired slave; in whom character, above even learning or genius or eloquence, is the great balancing power of his life; who, like John Adams in defending the British soldiers accused of murder because of the Boston massacre, are brave enough if need be to stand against popular clamor, even if, unlike John Adams, they fail to see public indignation against them turned to public praise. Of this profession, my brethren, to whom so much has been entrusted, much is rightly required. The glorious history which is its pride has lost its virtue if it remains only a record of a great past without force as an incentive for the future.

WITHOUT LAWYERS, NO LAWLESSNESS.

I have thus spoken of lawlessness and the lawyer, because without the lawyer the lawlessness is practically impossible. Men instinctively seek the advice of those learned in the law before they actively attempt to disregard its plain provision or to guard against the effect of its violation. Insurance companies do not attempt to influence Legislatures without legal advice. One single company is shown to have paid to a single lawyer \$100,000 annually for the past seven years for no other purpose than to influence the various legislatures, and he boasts of his employment in a printed defense, saying: "The mass of proposed legislation upon insurance topics, including taxation, was annually increasing in such volume that unless concerted action was taken the companies might be practically legislated and taxed out of existence."

CONFIDENTIAL SECRET SERVICE.

"We feel that if a secret service was a permissible governmental agency, a confidential service would be the only effective and at the same time a proper plan for the welfare of the most extensive commercial interests in the world, the life insurance business of the State of New York. This confidential secret service was decided upon as the only feasible plan of protection." And then he naively continues: "By this plan I was able to have as my representatives frequently men who would not have accepted the re-

tainer were it known that they were interested in legislation for insurance"—a comparison between secret service and confidential service which, as Mr. Lehman well pointed out in his recent address at the University of the State of Missouri, can only be understood on the theory that legislators are seeking to do wrong, for the secret service of the Government is aimed at lawbreakers, while the confidential service of the insurance companies was created to deal with lawmakers.

Nor do railroads arrange rebates and drawbacks and private concessions to large or favored shippers; nor does any great combination of capital take from either as to the actual value of what goes to pay up its capital stock or as to the purpose and manner of its future operations; nor do witnesses play fast and loose with truth, or clients regard affidavits as legal technicalities, without the counsel and assistance of members of our profession.

AGAINST PROFESSIONAL LOBBYISTS.

Can members of our profession still retain their standing among their brethren if their occupation, in whole or in part, is that of professional lobbyists, appearing, for hire, not before committees or at the bar of the house in open support of or antagonism to any proposed measure, but secretly, by personal influence or by use of the pass or by political power, if not, indeed, by the coarser means of the bribe, seeking to either accomplish or kill legislation, an employment which, whether in violation of an express statute or not, is a flagrant disregard of the fundamental principles of a representative government? Is it true today that the lawyer who will not counsel the doing indirectly of that which can not lawfully be done directly, is regarded as either a crank in character or inefficient in ability for modern practice? Must a man be half a knave to be a successful lawyer? Is ability to be measured alone by fees and not by character? Is commercialism to dominate the practice of law?

AIM NOT COMMERCIALISM.

Such is not the history of our profession; nor is it consistent with its purpose, or its aim. The doctor who gives drugs only because drugs are wanted, who helps to preserve or destroy embryonic life as children are either desired or despised by his patient, is a charlatan or abortionist. What shall be said of the lawyer who counsels and assists his client, not according to the law, but

in direct violation of it, and who has himself before God solemnly sworn that he will faithfully demean himself in practice, and to the best of his ability and understanding will support and uphold the Constitution and the laws of his State and his country.

“They love truth best who to themselves are true,
And what they dare to dream of, dare to do.”

Let him who plans a burglary try to obtain from any member of our profession counsel as to how he may best cover the tracks of his nefarious undertaking, or so complicate the circumstances as to prevent his detection or conviction, and he will speedily discover, as well he ought, in how high esteem is held the law which it is attempted to violate, and in how great contempt is held the criminal; but let him, with high character in the community and with high standing at the bank, who plans to disobey the law concerning rates of interest, or regulating the payment of capital stock in a corporation, or forbidding rebates, discriminations or drawbacks to shippers, or any other law that stands squarely in the way of his desire for business or for gain, apply for legal help, and how many are there in our profession who listen to his case without hesitation, and who counsel without shame, and profit without regret from their participation in the lawlessness of their employer? In truth, it may well be doubted whether the average practitioner takes time to “first endure, then pity,” before he eagerly embraces both the employment and its emolument.

The receiver of stolen goods will obtain from our profession no aid or comfort in planning for his dishonesty; but the receiver of rebate from the railroad, who in childlike innocence asks his counsel whether he may legally employ a man to look after his shipments and then safely retains large sums of money that are handed to him secretly by this same employe, coming he knows not whence, a pretended purposeless and unknown donation, is too apt to receive legal advice according to his liking; the lawless advice of a lawless lawyer.

PROFESSIONAL HONOR.

The lawyer can not be less honest in professional career than in private life, nor can he counsel the evasion of one law and the keeping of another without inciting the spirit of lawlessness and degrading the dignity of law, without which law is either obeyed only by brute force or becomes absolutely ineffectual. The Chinese are notoriously corrupt in public life and conspicuously honest in

mercantile pursuits. They can not always be both. As a nation, either commercial integrity will redeem official dishonesty or the corruption in public life will become prevalent in trade. It does not follow that the lawyer can be rightly identified with only good causes, or be engaged only on behalf of a thoroughly innocent man.

Judge Ellsworth, afterwards Chief Justice of the United States, once said to Jeremiah Evarts, who was anxiously inquiring as to the right of a lawyer to maintain the side of a lawsuit that was doubtful or wrong: "Any cause that is fit for any court to hear is fit for any lawyer to present on either side," for neither judge nor lawyer can with certainty determine the real right of a cause until both sides are heard, and even then the weakness and the wrong which clings to every thought and act and judgment of man too frequently prevents complete justice.

Sir Mathew Hale in the early years of his practice had much misgiving about undertaking causes in which he did not thoroughly believe; but lived to change his opinion, as case after case which he had refused to consider was finally decided to be abundantly good.

MAY TAKE DOUBTFUL CASES.

A lawyer may well undertake a doubtful case, but never can he righteously advocate what he knows is not law, nor can he counsel or assist in the evasion or disregard of law. It is one thing to secure for a client his rights concerning a past transaction, to insist that his guilt be legally proven, to claim in his behalf all that to which he is by law entitled. It is another thing to counsel and assist concerning a future course of action which either evades or disregards the law.

The bar of these United States, containing perhaps 100,000 members, many times greater in number than that of any country in the world, is doing more work today and better work than ever before in its history. The time when months could be given to the preparation of opinions by the bench, or days devoted by the advocate to argument, and weeks to conference, has, except in unusual cases, become a thing of the past. Things must be done in every vocation and trade of life not less well, but far more quickly, and the lawyer is no exception to this rule. In a sense, he has of necessity changed somewhat with the times and has taken to himself more of business than once he had, but with it all there is in the practice of law something far greater than mere financial gain. It is not and never can be a mere commercial pursuit. The profession that has come down to us is laden with its

trophies of rights maintained, wrongs overthrown, liberties secured and preserved, innocence established and guilt punished; and it can in our day have no greater glory than to uphold and maintain the law of the land; and refusing to counsel or assist in its evasion or violation thus establish by practice and counsel, as well as by precept among the people, that general respect for the law which in a government like ours, of the people and by the people, as well as for the people, is absolutely essential.

THE LAW OF BRIBERY.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 11, 1906,

BY

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The statutory law of Arkansas makes it a felony to give or to offer to give a bribe to a legislative, executive or judicial officer; it also makes it a felony for such officer to accept a bribe; but it does not make it an offense for such officer to solicit or agree to accept a bribe. In this regard Arkansas might well profit by the example of her sister State, Texas, which, by statutory law, makes it a felony for one to give or offer to give a bribe to a legislative, executive or judicial officer; and also makes it a felony for such an officer to accept or offer to accept a bribe, and emphasizes the greater enormity of the offense upon the part of the officer by making his maximum penalty ten years, while fixing that of him who offers to give at five years.

In the absence of statutory law, it was held in *Hutchison v. State*, 36 Texas, 293, that an offer by an officer to receive a bribe was not a crime.

In *State v. Rowles*, 69 L. R. A., 176, it was held that a solicitation of a bribe by an officer is not a crime under the laws of Kansas. The court saying: "The statutes of many States by express provisions punish the solicitation of bribes. The statute of this State in force in 1905, relating to the giving of bribes, devoted a separate section to offering or attempting to bribe. The appearance in the new law (Acts of 1901) of an analogous section relating to soliciting or attempting to secure a bribe might well have been anticipated, but nothing of the kind was inserted. Presumably the Legislature expressed itself fully and did not intend to punish a solicitation, unless he actually received the bribe.

The spectacle of a public officer soliciting his own purchase is so disgusting that the subject scarcely would have escaped the legislative attention. But many practical considerations are involved in the detection and punishment of bribery. Ordinarily, disclosure must come from one or the other of the participants in the despicable business. And the same policy which so long exempted the bribe taker altogether may have been wisest in regard to solicitation. In any event, this court should not be called upon to outstrip the Legislature and by construction invent a crime which, with many precedents before them, the lawmakers might have delineated in a few words while engaged in remodeling the bribery law."

In *Sullivan v. State*, 110 Mo. App., 75, being a case wherein Sullivan, a State Senator, was convicted of the crime of soliciting a bribe, it was held to be a misdemeanor under the common law for an officer to solicit a bribe. The court said: "It makes no difference whether the offense, which is soliciting, is made a felony by an act of parliament or by common law, it is only necessary that it be a felony. No matter how made so. In this jurisdiction, where it prevails, the common law is a standing declaration that whoever solicits a commission of a felony is guilty of a misdemeanor. It is not a declaration that whoever solicits the commission of an offense which is a felony at any given time shall be guilty of a misdemeanor, but it is a declaration that whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor. If the defendant solicited that he be bribed, he solicited the commission of a felony and he therefore committed a common-law misdemeanor."

In *Walsh v. People*, 65 Ill., 58, being a conviction of a member of a city council for soliciting a bribe, the court said: "As we have seen, the mere offer to bribe, though it be rejected, is an offense; the party who makes the offer is amenable to indictment and punishment. The offer amounts to no more than a proposal to bribe; it is but a solicitation to a person to take one. The distinction between an offer to bribe and a proposal to receive one is exceedingly nice. The difference is wholly ideal. If one man attempts to bribe an officer and influence him to his own degradation and to the detriment of the public and fails of his purpose, is he more guilty than the officer who is willing to make sale of his integrity, debase himself, and who solicits to be purchased, to induce a discharge of his duties? According to well-established principles of common law, the proposal to receive a bribe was an act which tended to prejudice the community; greatly outrage public decency; was in the highest degree injurious to public

morals; was a gross breach of official duties, and must, therefore, be regarded as a misdemeanor, for which the party is liable to indictment."

The Supreme Court of Arkansas has never been called upon to decide whether or not the solicitation of a bribe by an officer is a crime. The court has, however, declared the common law to be in force, except in so far as it has been abrogated by statute. *State v. Porter*, 38 Ark., 637. In other States where the common law is in force it has been uniformly held that it is a crime for an officer to solicit a bribe. It would seem, therefore, that the solicitation of a bribe by a legislative, judicial or executive officer is a crime in Arkansas, unless the common law of bribery has been absorbed and vacated by the statute law on the subject. The statutory law of Missouri relative to the crime of bribery is substantially the same as that of Arkansas, and it was there held that it did not abrogate the common law making the solicitation of a bribe a crime.

Only three cases touching the law of bribery have been before the Supreme Court of Arkansas. First, *Watson v. State*, 29 Ark., 299, was a case wherein Watson, a justice of the peace, had been convicted of compounding a felony. The only thing the court decided was, that if the defendant was guilty of any offense, he was guilty of bribery. The next was *Chapline v. State*, being an appeal from a conviction upon a charge of conspiracy to bribe members of the General Assembly. The only question the court was called upon to decide was whether or not the evidence sustained a verdict. The next and last is that of *Ex Parte F. O. Butt*, 5 Ark. Law Rep., 149. The Supreme Court in sustaining the lower court in its action in committing Butt to jail for contempt, by his refusal to answer questions propounded by the grand jury, held, in construing Section 3087 of Kirby's Digest, which is as follows: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime, or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense,"—that one who has participated or has been concerned in the commission of the crime of bribery may be compelled to testify to the facts connected with the commission of the crime, even if his testimony will incriminate or tend to incriminate himself. These three cases constitute all that has been said by the Supreme Court of Arkansas upon the law of bribery.

The writer has found twenty-two cases which have been before

the court of last resort in Texas involving the law of bribery. Since 1858 in the State of Texas it has been a statutory crime to give or offer to give a bribe to a legislative, executive or judicial officer, and likewise a crime for such officer to receive or offer to receive a bribe. Of the twenty-two bribery cases just referred to seventeen are cases wherein the defendants were charged with having committed the crime of bribery by offering to give a bribe; one by offering to accept a bribe; four were charged to have been committed by receiving a bribe. Of the seventeen cases, eleven were reversed; of the four cases three were reversed, leaving in both States only one case that has been affirmed, wherein the defendant was charged with committing a crime by receiving a bribe, being the case of *Mosley v. State*, 25 App., 515—the defendant having been convicted of bribery committed by his receiving \$15 for releasing from his custody a party whom he had arrested, Mosley being the constable at the time.

It is a curious fact that so many have been charged and convicted of having committed the crime by offering to give a bribe, and that so few have been convicted of having committed the offense by accepting the bribe, with so small a percentage of reversals in the first instance and so large in the last. It may be safely asserted, however, that the difference arises from the disposition of man to conceal his crimes and the rules of law by which the law of bribery is enforced, rather than from the difference between the integrity of the citizen before and after he is elevated to an office. A rejected offer to bribe is likely to be exposed. The party to whom it is offered and who rejected it has nothing to lose and often much to gain by exposing it. An offer to bribe which is accepted is usually forever concealed. Neither party to the transaction has anything to gain by disclosing it, but, on the contrary, everything to lose, and, therefore, all parties have the most powerful inducement to hide the crime. The most important principle enunciated by the Texas court so far as the enforcement of the law of bribery is concerned is that announced in *Ruffin v. State*, 36 App., 565, and in *Morawetz v. State*, 80 S. W. Rep., 997, where it was held that the receiver of a bribe is an accomplice of the giver, and vice versa.

Article 781, Revised Statutes of Texas, is as follows: "A conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense."

In *Nourse v. State*, 2 App., 317, the court said: "It will be seen that to justify a conviction on the testimony of an accomplice

there must be some evidence which of itself, and without the testimony of the accomplice, tends in some degree to connect the accused with the commission of the crime." This construction of the statute has been followed in all the later cases.

Section 2380, Kirby's Digest of the Law of Arkansas, is as follows: "A conviction can not be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had upon the testimony of an accomplice."

In *Kent v. State*, 64 Ark., 253, the Supreme Court said: "It is the duty of the presiding judge to see that there is some evidence independent of the testimony of the accomplice which of itself tends to connect the accused with the commission of the crime, but the question of what weight to attach to the evidence is for the jury."

The Supreme Court of Minnesota holds that the receiver of a bribe is not an accomplice of the giver, and vice versa. *Shaw, Justice*, in deciding the case, *State v. Durnam*, 73 Minn., 150, said: "An accomplice, in legal signification, is one who co-operates, aids or assists another in the commission of a crime, either as principal or accessory. The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense, either as principal or as accessory? If he could not, then he is not an accomplice. (*Com. v. Wood*, 11 Gray, 85.) Each of the two parties to a transaction may be guilty of a crime and yet, if the two crimes are separate and distinct crimes, the one is not the accomplice of the other. Thus, suppose, A asks B for a bribe and B pays it. A is guilty of the crime of asking a bribe and B of the crime of giving one, but the two crimes are entirely distinct, and neither party could be indicted, either as principal or accessory, for the crime committed by the other. Such a case would not be within the statute forbidding a conviction on the uncorroborated evidence of an accomplice, although, of course, the moral delinquency of either, if called as a witness against the other, would be a fact going to his credibility, which the jury should take into consideration."

The Supreme Court of New York, in *People v. Bessert*, 172 N. Y., 643, holds, without stating any reason for its ruling, that the receiver of a bribe is an accomplice of the giver. These seem to be the only cases in point. Where does reason lie in this matter as applied to the statute of Texas and of Arkansas?

Article 74, Penal Code, Texas, says: "All persons are principals who are guilty of acting together in a commission of an offense."

Section 1563, Kirby's Digest of the Laws of Arkansas, is as follows: "All persons being present, aiding and abetting, or ready and consenting to aid and abet in any felony shall be deemed as principal offenders, and indicted and punished as such."

From these statutes, it follows that if A offers to give to B, a legislative, executive or judicial officer, a bribe, and B agrees to accept it, in Arkansas, A is guilty of the statutory felony of offering a bribe and B is guilty of the common-law misdemeanor of offering to accept a bribe, and in Texas both are guilty of a statutory felony, A of offering to give and B of offering to receive a bribe. But as B was present and acted with A in A's committing the crime of offering B a bribe, B is clearly guilty, in law, as a principal, of offering to give the bribe, which he in fact really offers to accept. And as A is present and acts with B in B's committing the crime of offering to receive a bribe, A is, in law, therefore guilty as a principal of the crime of offering to receive the bribe, which he really in fact offers to give. If the agreement is carried out, both A and B are guilty of a statutory felony, one of giving, the other of receiving a bribe. But as B acts with A in A's committing the crime of giving B a bribe, B is clearly guilty as a principal in giving himself a bribe, the bribe he really receives. And as A acts with B in B's committing the crime of receiving the bribe, A is guilty as a principal in the crime of receiving the bribe he really gives.

It, therefore, follows that where a bribe has been given and accepted, the giver may be indicted and prosecuted for two separate and distinct offenses, one for giving a bribe and one for receiving the same bribe; the one who receives it may be indicted and prosecuted for two separate and distinct offenses, one for receiving a bribe and the other for giving a bribe which he receives. Such is certainly the logic of the law. And while the writer has not been able to find any reason stated by any court of last resort which has held that the bribe giver is an accomplice of the bribe taker, and vice versa, for such holding, it is certainly true that their ruling could be sustained by such reason.

While the law is thus prolific in carving out of one corrupt act so many crimes as it does out of the completed act of giving or receiving a bribe, yet it has, both in Texas and Arkansas, by the statute forbidding a conviction upon the uncorroborated testimony of an accomplice, and by the construction put upon said statute in both States, to the effect that the corroborating testimony must, independent of and without the aid of the accomplice's testimony,

connect or tend to connect the defendant with the commission of the offense, gone far to prevent any successful prosecution of this most aggravated form of bribery, that is, of giving and of receiving a bribe.

What the law of bribery is has never been a source of difficulty to any court. How to successfully enforce the law against bribery as it now is, is the perplexing problem of many States where bribery and graft are abroad in the land. It must become perfectly apparent to anyone who will carefully study the question, that before there can be successful prosecution of persons guilty of the crime of bribery the statute must be so modified as to permit one to be convicted upon the uncorroborated testimony of an accomplice, or at least the construction of the statute as it now stands must be so modified as to permit the jury to consider the corroborating testimony in connection with and by the aid of the testimony of the accomplice, instead of considering it independent of and without the aid of the accomplice's testimony in determining its incriminating force.

In Missouri, the only State where prosecution against persons charged with the crime of bribery has reached any marked degree of success, the rule touching the evidence of an accomplice is announced in the following declaration of law in *State v. Donnelly*, 130 Mo., 649, and approved in *Meysenberg v. State*, 171 Mo., 1, the latter being a bribery case: "The court instructs the jury that they are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone, if they believe the statements given by such accomplice in his testimony are true in fact, and sufficient in proof to establish the guilt of defendant. But the jury are instructed that the testimony of an accomplice in a crime when not corroborated by some person or persons not implicated in the crime, as to matters material to the issues, that is, matters connecting the defendant with the commission of the crime charged against him, and identifying him as the perpetrator thereof, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony."

One who undertakes the task of enforcing the law of bribery soon becomes impressed with the force of the language of the Supreme Court of Kansas in the case of *State v. Bowles*, *supra*, wherein the court says: "But many practical considerations are involved in the detection and punishment of bribery. Ordinarily, disclosures must come from one or the other of the participants in the despicable business."

The crime of bribery is *sui generis*. This is especially true as

to the evidence of the corpus delicti. The corpse remains as unmistakable evidence of the crime of murder; the charred remains, of the crime of arson; the false writings, of the crime of forgery; the broken window, of the crime of burglary, and so on, almost through the catalogue of crimes. Not so in the crime of bribery. Like a snake winding over the solid rock, the bird cleaving the atmosphere, or the baseless fabric of a vision, the briber leaves no track behind.

One who claims to be an accomplice in the crime of receiving or giving a bribe occupies towards the one against whom he testifies an attitude very different from that occupied by one who claims to be an accomplice in any other crime, except, possibly, conspiracy. One illustration will serve: A is being prosecuted on the charge of arson for burning B's house, C appears as a witness for the State and testifies that he and A burned the house. This certainly establishes the guilt of C. But it does not necessarily prove the guilt of A. C may be telling the truth about his own participation in the crime, but falsifying as to A. Arson being a crime which one can commit, C may be the sole criminal. But suppose A is charged with the crime of bribery, committed by having received a bribe from C. C appears as a witness for the State and testifies that he gave the bribe to A. The fact that C committed the crime of arson and gave evidence establishing his own guilt did not necessarily prove the guilt of A; but the fact that C committed this particular crime of bribery does necessarily make A guilty, because one can not commit the crime of giving a bribe alone, a giver necessarily implying a receiver. In the crime of arson the guilt of C could be asserted and proved without inculcating A, but in the bribery case the assertion that C is guilty of the crime of bribery certainly asserts the guilt of A. It being impossible for guilt to attach to C alone. There are, of course, exceptions to this statement, but it is a correct expression of the rule.

It is said the fear of ultimate detection and the hope of purchasing leniency are the motives that usually induce one criminal to testify against his confederates. In the administration of the criminal law it has seldom happened that the State, in the absence of physical evidence of the corpus delicti, has been able to inspire such fear or hope in the breast of any criminal. In the writer's own experience, without any well-grounded fear of detection, one contractor, one planter, one lawyer, two State Senators and two confessed professional lobbyists have testified or made affidavits that they gave various sums of money as bribes to different members of the last General Assembly of Arkansas. There is no such inherent vice in the testimony of any one of them as to neces-

sarily breed distrust as to its truthfulness. However, these confessed bribe givers are fully protected from the effect of their own testimony by that provision of the law which forbids it being used against them in any prosecution, and the alleged bribe taker finds much encouragement in that and other provisions of the law which absolutely precludes conviction upon the uncorroborated testimony of an accomplice, together with that construction of the statute which says that the corroborating testimony must, independent of and without the aid of an accomplice's testimony, connect or tend to connect the defendant with the commission of the offense.

As the law now exists in Arkansas the Senate may be in session, a Senator, in the presence of his fellow members and a crowded gallery, may make an argument advocating the passage of a pending bill. When he takes his seat, a lobbyist representing the corporation whose interest will be injuriously affected by the passage of the pending bill may enter the Senate chamber, approach the Senator, hand to him uncovered and exposed a large roll of money, and the Senator receive and retain the same, all in the plain view and to the certain knowledge of Senators and other spectators. Upon roll-call the Senator may vote against the bill for the passage of which just prior to the reception of the money he had earnestly urged. The lobbyist may, in obedience to a subpoena and under the obligation of an oath testify that he gave the Senator the money as a bribe to influence his vote upon the bill, and all the other Senators may testify as to the passage of the money and as to the Senator's sudden change upon the bill, and the president of the affected corporation may testify that he gave the money to the lobbyist to give to the Senator as a bribe, and did so in pursuance of a corrupt agreement between the Senator and himself. The Senator may sit quiet and make no denial. Yet on this undisputed testimony the Senator is entitled to an acquittal, although the jury and the court may be absolutely convinced of his guilt, because, first, he can not be convicted on the uncorroborated testimony of the accomplice, or accomplices; second, one accomplice can not corroborate another, therefore he can not be convicted upon the uncorroborated testimony of the lobbyist and the president of the corporation; and, third, because the corroborating testimony must of itself, unaided by, and independent of the testimony of the accomplice, or the testimony of all the accomplices, incriminate or tend to incriminate; and, fourth, because the Senator receiving the money has changed from a friend to a foe of the bill, are all, severally or combined, when considered separate and apart, independent of and unaided by the testimony of the accomplice, inno-

cent acts, and, therefore, devoid of incriminating force. Since the real function of corroborating testimony is to aid the testimony of the accomplice, and since the only way to gather the full and accurate force of the body of the testimony is to consider it altogether, letting every part aid or destroy every other part in so far as it can logically do so, there can be certainly no sound reason assigned for that construction of the statute which says that the corroborating testimony must of itself, considered separate and apart, independent of, and unaided by the testimony of the accomplice, incriminate, or tend to incriminate the defendant. The majesty of the law imperatively demands that the rules of evidence be so modified that such a travesty on truth and such a violence to justice as is now possible in a prosecution for bribery shall not be chargeable to the law.

For the trial judge to instruct the jury to receive the testimony of an accomplice with caution and weigh it with great care, is the rule of common-law practice. In many of those States where there is a constitutional inhibition against the trial judge instructing the jury as to the weight of evidence the Legislatures have converted this rule of practice into a fixed and unvarying rule of law. This has been done in twenty States—Alabama, Arkansas, California, Georgia, Idaho, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Wyoming—the provisions being substantially the same in the various States. In twenty-six States one may be convicted upon the uncorroborated testimony of the accomplice.

As to the wisdom of this fixed and unvarying rule, Joy says: "How the practice which at present prevails could ever have grown into a general regulation must be a matter of surprise to every person who considers its nature, or who inquires into the foundation on which it rests. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with as the particular circumstances of each case may require, it seems difficult to explain. Why a fixed, unvarying rule should be applied to a subject which admits of such endless variety as to the credit of the witnesses seems hardly reconcilable to the principles of reason. * * * Nor, if we inquire into the foundation for the rule, shall we find in it anything certain or fixed, such as ought to be the basis of a uniform and never varying rule. We shall be told by one that it is the moral guilt of the witness which produces this, as it were, practical incompetency, whilst another ascribes it to the desire he has to purchase immunity for his own transgression. If it be the moral guilt of the witness

that affects his credit, the degree to which his credit is affected must depend upon and vary with the magnitude of the crime of which the witness confesses himself to be guilty. Yet to all the rule equally applies. The witness who on cross-examination confesses that he has been engaged in many murders, appears more stained with guilt than he who comes forward as an accomplice to one crime; yet the former is without the scope of the rule, whilst the latter comes entirely within the sphere of its operation. The testimony of the same witness may in one trial be rejected under the operation of the rule, and in the very next trial, on the same day, it may be permitted to go to the jury; yet his moral character has undergone no change in the interval. Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and lowest degree of guilt. But an accomplice comes forward, we are told, to save himself, and his credit is affected by the temptation, which is thus held out, to forswear himself. But who is it that establishes his guilt? He himself—he is his own accuser—and the proof, and often the only proof which can be had of his guilt, comes from his own lips. If this be the foundation of the rule, it rests on the shifting sand. The temptation to commit perjury which influences his credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty. But the rule applies with equal force in all cases whether the punishment be a minute imprisonment or death. Universal and indiscriminating, the rule levels all distinctions. Where, then, is the necessity or good sense in such a rule? That persons whom the interest of the community require, and principles of sound policy invite to come forward, should not be marked by a rule which has not been deemed necessary in the case of atrocious offenders not appearing in the character of accomplices, seem to me to be what is required by justice and good sense."

In *State v. Hyer*, 39 N. J. L., 602, the court say: "To deny to a conviction upon the uncorroborated testimony of an accomplice would be to take from the jury the right of judgment upon the weight of testimony legally competent, and to compel them to find against their conviction of its truth. The admission of persons accused of crimes has removed one ground for disfavoring such testimony."

In *State v. Litchfield*, 53 Me., 270, the court say: "The degree of credit to be given to an accomplice was submitted to the jury with proper instructions. There is no rule that they may not convict upon such testimony. There should be none such. The degree of credit to be given a witness, whatever may be his character or position in the cause, should not be arbitrarily determined

in advance of his testimony and in ignorance of the circumstances affecting its credibility."

In *State v. Betsall*, 11 W. Va., 741, the court say: "It might be that the uncorroborated testimony of the accomplice would be entirely convincing to a jury. * * * While the court in our State is not allowed to instruct the jury on the weight of the evidence, yet there is the largest latitude from counsel in commenting on the weight of the testimony; and the jury are not apt to believe the uncorroborated testimony of the accomplice, stained as he is by his own admission, unless there is something about the manner of his testifying, and the other circumstances surrounding the transaction, which convince the jury that the witness is telling the truth."

In *Thistlewood's Trial*, 33 Howard St. Tr., 681, Abbott, Chief Justice, says: "Dark and deep designs are seldom fully developed except to those who consent to become participators in them, and can, therefore, be seldom exposed and brought to light by the testimony of untainted witnesses. Such testimony should be received on all occasions with great caution; it is to be carefully watched, deliberately weighed and anxiously considered. If, however, it should ever be laid down as a practical rule in the administration of justice, that the testimony should be rejected as incredible, the most mischievous consequences must ensue."

There is one effective remedy against corrupt lawmakers both in Texas and Arkansas, wherein this rule as to testimony of an accomplice can not be invoked. The Legislature has a right to expel one of its members who is guilty of bribery, and conviction, or even prosecution, is not a condition precedent to expulsion.

French et al. v. Senate, 146 Cal., 604, is a case in point. There several members of the Senate had been expelled because, it was alleged, they had accepted bribes. The constitutional provisions of California prescribing the Senate's power are the same as those of Arkansas and Texas. The expelled Senators contended that under the Constitution they could not be expelled until they were convicted, and alleged the charges against them were false. The court say: "The oath of each individual member of the Senate, and his duty under it to act conscientiously for the general good, is the only safeguard to the fellow members against an unjust and causeless expulsion. This is the only practical rule that can be adopted as to those unrestricted governmental powers which are necessary to the exercise of governmental functions, and which must be lodged somewhere. Each department of the State is necessarily vested with some power which is beyond the supervision of any other department, and in such cases the only protection against

abuse is the conscience of the individual in whom the power is vested.

"It is claimed that the power to expel for bribery is, by Section 35 of Article 4, limited to those cases in which the member has been convicted of the crime defined in that section. The section provides that any member of the Legislature who is influenced in his official action by any reward or promise thereof is guilty of a felony, and that upon conviction he shall be forever disqualified from holding any office or public trust. It is obvious that this section was not intended to have any effect whatever upon the power to expel members of the Legislature given by Section 9 of the same article. The two provisions are entirely independent and are made for different objects and purposes. The power to expel is given to enable the legislative body to protect itself against participation in its proceedings by persons whom it judges unworthy to be members thereof, and affects only the rights of such persons to continue to act as members. The provision of Section 35 defines a certain crime and prescribes the effect of a judgment of conviction thereof upon the subsequent status as a citizen of the person found guilty. A resolution of the Senate expelling a member, whether for bribery or for some other offense, or improper conduct, is not the equivalent of the conviction of the person of the crime set forth in the charges against him."

Thus it will be seen that each body has ample power to speedily expose and expel those who bear the taint of bribery, and there is ample evidence easily obtainable upon which one body of the next General Assembly of Arkansas can act.

In the great sea of knowledge and action, and happiness, God has not left us without a chart and compass, but has engraved upon our hearts those laws which are to govern and guide us in the great affairs of life, and has endowed man with the ability to make those laws which should control his actions in the lesser affairs of life. Those laws which He has given us are adjusted with infallible accuracy to our perfection and our happiness. Those laws which we make for ourselves should be impressed by the same virtues, wisdom, power and goodness; a consummation that can be fully attained only when those who are willing to make merchandise of their legislative power are driven from the legislative hall.

In the contest between the State and this most dangerous class of criminals, the State should not be handicapped by a fixed technical rule which prevents a conviction although the defendant has been proven guilty to the entire satisfaction of the jury, according to the rules of evidence under the common law, and under the law as now found in twenty-six States of the United States.

RECONSTRUCTION AND THE KU KLUX KLAN.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 10, 1906,

BY

MR. T. W. GREGORY,
OF AUSTIN, TEXAS.

When an American has been born who can write an impartial history of the ten years of our country immediately succeeding Appomattox, and deal fairly with the opposing factions in the bitter and frequently bloody after-struggle, he will find nothing so remarkable and mysterious as the purposes and history of "The Invisible Empire," more commonly known as the "Ku Klux Klan." It sprang into being almost in a night; it spread with inconceivable rapidity, until its "dens" largely dominated the States of Mississippi, Alabama, Tennessee, Georgia, North Carolina, South Carolina, Florida, and parts of Arkansas and Louisiana. It defied State and national authority (as they then existed), and under the very nose of the army of the United States it sent forth 100,000 armed men to do its bidding, passed laws without Legislatures, tried men without courts, and inflicted penalties, sometimes capital ones, without benefit of clergy; it was the most thoroughly organized, extensive, and effective vigilance committee the world has ever seen, or is likely to see; its every act was in defiance of the established order and the spirit and letter of our institutions, and yet I am thoroughly convinced that, among conditions as they existed in the States referred to between 1866 and 1872, scarcely a man in this assembly would have been other than a Ku Klux or a Ku Klux sympathizer. I do not mean that anyone present could for an instant tolerate or excuse many acts of cruelty and oppression committed by "The Invisible Empire," or the still larger number committed in its

name by its enemies and reckless and malicious individuals, who had no real connection with the movement; I do not mean that the original design of the organization, treated as an academic question, could meet with the approval of right-minded men; but an individual can be properly judged only in the light of surroundings and the conditions under which he acts; applying this standard, the Ku Klux movement assumes the dignity of a revolution, the protest of a proud and despairing race against conditions not to be endured; not a movement of weaklings or theorists, but of desperate men, challenging fate, and swearing that life, liberty and the pursuit of happiness should be theirs and their children's *at any cost*.

All authorities have not agreed on what constitutes the right of revolution; it is stated by one that "The right of revolution is the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their system of government or institutions, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or are so obstructed as to be unavailable." (Black's Constitutional Law, 2nd Ed., p. 11.)

Another says—"The general duty of obedience to the laws results from the protection they afford to the lives and property of the citizens and subjects; but when a civil government fails to afford that protection, and obstinately persists in a course injurious to the people, and when the probable evils accompanying the change are not greater than the blessings to be obtained by it, revolution becomes a duty as well as a right." (Sir Sherston Baker.)

Still a third says—"When a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under an absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their security." (Halleck on International Law.)

It has been contended by some that the right of revolution exists in instances where there is a reasonable probability of its being successfully asserted, and it may be said that a revolution is a rebellion which succeeds, while a rebellion is a revolution which fails; measured by any of these rules, the Ku Klux movement must be set down as a revolution, in that it accomplished certain results when all other measures had failed.

The author of this paper was born during the war and raised on a plantation in Monroe County, Mississippi, near the Tombigbee River; it was a section devoted to cotton raising, the negroes outnumbered the whites about four or five to one, and no portion of

the South suffered more from the horrors of reconstruction or responded more militantly to the call of "The Invisible Empire."

As a child the writer has spent many a winter's evening in the negro quarter listening to the weird stories of phantom horses and gigantic riders who nightly kept the countryside in fear, of ghostly visitors whose grinning skulls were carried under their arms and whose skeleton hands were offered in salutation, and of how each night they came from the graves of Shiloh and Vicksburg to ride again and warn the wandering negro to stay by his own fireside and not tempt Providence by nocturnal meetings.

As the years rolled by the child gradually learned who the riders were, and why they rode; he came to know that perhaps all the adult male members of his own family had been Ku Klux, and in writing and by word of mouth received from survivors a clearer insight into what has never been half understood at the North and not fully at the South. In his search for the truth the writer has not hesitated in appropriating from several excellent articles on the subject important facts and figures, some of which he has not had an opportunity of fully verifying, but all of which are believed to be correct; an article written by D. L. Wilson, which appeared in the *July Century* for 1884, entitled "The Ku Klux Klan," and one published by William Garrott Brown in the *Atlantic Monthly* of May, 1901, with the title "The Ku Klux Movement," have been especially helpful, and quotations from both have been freely indulged in in several instances.

In order to understand the remarkable conditions existing when the order sprang into being and did its work, it is necessary to glance at national legislation and policy between 1865 and 1872.

Perhaps the greatest misfortune which could have befallen the South was the assassination of Abraham Lincoln; he was not only a great man, but he was a kind and generous man, who, throughout the war, looked upon the South as an erring child to be brought back, forcibly if necessary, into its father's house, and in dealing with the great problems immediately following the war he would have acted with "charity for all, with malice towards none."

Perhaps the second greatest misfortune which could have befallen the South was the succession of Andrew Johnson to the presidency. With the single exception of Aaron Burr, no public man of our country has suffered so much at the hands of his contemporaries as has Andrew Johnson; despised by the South as a renegade, first distrusted and finally hated by the Republicans with a venom unsurpassed in public life, he was ground between the upper and nether millstones. As a matter of fact, honesty and consistency marked his remarkable political career, but no man was

ever more brutal or less diplomatic in dealing with delicate situations or endowed with such a faculty for doing the right thing in the wrong way.

It hardly admits of question but that Johnson adopted, almost *in toto*, the plan Mr. Lincoln had mapped out for dealing with the Southern States, involving the immediate organization of the State governments and their representation in both Houses of Congress.

The details of the plan included the appointment of a provisional governor by the President in each State, and the calling of a Constitutional Convention with delegates selected by those who were qualified voters under the old laws and would take the oath of allegiance prescribed by the Amnesty proclamation; it was also Mr. Lincoln's plan to admit as voters such negroes as could read and write and had served in the Union army.

When Congress met in December, 1865, the Southern States had carried out the design of the President.

It must be borne in mind that throughout the war and up to this time the North and the Republican party had uniformly contended that the Southern States had never been out of the Union, that the Union and the States were indestructible, and that there was no way by which any of them *could get out*; this had been announced in various resolutions of Congress and proclamations of Mr. Lincoln, and was in fact the only theory on which the position of the Union in the war between the States could be sustained.

Immediately on the collapse of the Confederacy the views of the leaders of the Republican party underwent a startling change; Thaddeus Stevens, as leader in the House, and Wade and Sumner in the Senate began to preach the doctrine that the Southern States had become conquered provinces, that all Federal laws and guarantees of the Constitution of the United States were suspended within their limits, and that Congress alone could restore the laws and rights so suspended. If the Southern States were still States of the Union, then their citizens were entitled to all the guarantees of the Federal Constitution; if they were no longer States, then a successful war waged to preserve the Union had resulted in its dissolution.

It is not the purpose of this paper to discuss the motives that inspired these men. It is to be noted, however, that at the very time the dominant party in Congress was denying the existence of these States as such, the Supreme Court of the United States was recognizing their existence by trying cases brought by and against them as States, the justices of the court were sitting on Circuit in these States, which was permissible only in the event that they

were States, and their votes as States had just been considered and counted in the adoption of the Thirteenth Amendment, which otherwise could not have been adopted, as the Southern States constituted over one-fourth of those in the Union.

The personal and political strength of Mr. Lincoln, coupled with the fact that he was one of the original leaders and organizers of the Republican party, might have enabled him to succeed where Johnson failed. Andrew Johnson was never a Republican, but a States Rights Union Democrat, and in 1864 was placed on the Republican ticket as a sop to the War Democrats of the North and to strengthen the administration in the border States.

The North had hardly recovered from the first sensation of horror over the assassination of Mr. Lincoln and corresponding bitterness towards the South, before President Johnson announced his policy, and the long contest between the Executive and Legislative Departments of the National Government began.

The first open rupture occurred in February, 1866, when the President vetoed what is known as the "Freedmen's Bureau Bill," which was passed in a slightly different shape over his second veto on July 16th of the same year.

The bill established a bureau, to be a part of the War Department, which was to have jurisdiction over all matters pertaining to freedmen; it provided for agents to be appointed from the army, or civil life, in all the counties of the South, who were to exercise the powers of military judges; among other vague and indefinite provisions it contained the following: "The President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights" as are guaranteed to freedmen by the terms of the bill; these agents likewise exercised jurisdiction over all matters of contract between negroes and white men; in trials before them, the ordinary rules of law governing procedure were abolished, the right of trial by jury (secured by the Constitution of the United States and that of every State in the Union) was denied, no presentment or indictment was required, the punishments were not fixed by law, but were such as the different agents might deem proper and adequate, and from these remarkable tribunals no appeal lay to any of the courts vested by the Constitution of the United States with the exclusive judicial powers of the Nation. Last, but not least, a detail of troops was at the beck and call of each agent to enable him to enforce his extraordinary jurisdiction. Although the Constitution of the United

States provides that every State shall have at least one representative in Congress and that no State, without its consent, shall be deprived of its equal suffrage in the Senate, not a single member of either House of Congress from any of the States affected by this bill was recognized or allowed to participate in the proceedings of Congress when it was being passed, although, under proclamation of the President, their State governments had been duly organized and their elected representatives were at Washington demanding their seats.

At this day it will not be seriously contended that this legislation was warranted as a war measure, for the war had been over over for more than a year, and the authority of the United States was not being questioned in any portion of the South.

In the spring and summer of 1867 Congress passed, over the President's veto, three bills providing for "the more efficient government of the rebel States."

These bills divided ten of the Southern States into five military districts, each to be ruled over by an army officer not below the rank of brigadier general; his duties and authority were "to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals"; one provision declared all interference by State authority void; another provided that the military commander might "allow local civil tribunals to try offenders," but left it to his discretion whether he should do so or not; another gave to the commander the power to suspend or remove from office, or from the performance of official duties, all civil or military officers of any State or municipality, and fill their places with such soldiers or civilians as he saw fit; the effect of this legislation was to abolish trial by jury in all *criminal and civil cases*, to proclaim martial law and thereby suspend the writ of habeas corpus to authorize arrests without warrant, abolish indictment and presentment for crime, discard process of law, and make the citizen and his property answerable to the will or caprice of a military officer from whose decision there was no appeal, except in case of a death sentence, when the approval of the President was required; the power was also given to the military commander to delegate most of these powers to whatever subordinates he saw fit. Not only did this legislation violate almost every guarantee of the State and Federal Constitutions, but it gave to a subordinate military officer powers which the combined legislative, executive, and judicial branches of the National Government could not exercise.

In one of his veto measures Andrew Johnson truthfully said,

"Such a power has not been wielded by any monarch in England for more than five hundred years. In all that time no people who speak the English language have borne such servitude."

In this legislation it was also provided that the prescribed military rule was to continue until the ten States held constitutional conventions in a manner set out, elected delegates thereto under domination of the military, adopted constitutions satisfactory to Congress, had their Legislatures adopt the Fourteenth Amendment to the Constitution of the United States, and until said amendment had been adopted by three-fourths of the States of the entire Union.

When it is added that up to 1872 all white men were disfranchised and forbidden to hold any State or Federal office who had been engaged in insurrection or given aid or comfort to the enemies of the United States and had previously held any State or Federal office, it will be seen how complete was the scheme of reconstruction.

The only possible excuse for the plan was that the condition of the country demanded martial law and the suspension of the writ of habeas corpus, and this is fully met by calling attention to the fact that the suspension of this great writ is prohibited by the Constitution except in cases of "rebellion or invasion"; no one will seriously contend that either of these conditions existed.

The Civil Rights Bill, passed several years later through the influence of Charles Sumner, completed what are usually considered the reconstruction acts. Sumner is said to have been a believer in the social equality of the negro, and for the purpose of forcing this on the South a bill was put through Congress authorizing the United States courts, by heavy penalties, to compel admission of negroes to hotels, theaters, schools, etc., and upon juries. This last act was held unconstitutional by the Supreme Court of the United States in 1883. A bill was also introduced by Thaddeus Stevens to confiscate the property of all persons who participated in the rebellion, but this never became a law.

The writer of this paper is willing to let these acts speak for themselves without further comment, except to quote the recent public denunciation of them by Chas. Francis Adams as "impossible and indefensible."

But, if the reconstruction laws were unconstitutional, and wrong and vicious in theory, their practical application to the situation was infinitely worse; substantially all of the intelligent class of the South were disfranchised; the negroes, not one of whom out of every hundred could either read or write, constituted almost the entire voting population; carpetbaggers from the North and scalla-

wags from the South, composed almost exclusively of the very scum of creation, organized and controlled the negro vote, held the more lucrative offices and began an era of corruption and plunder unheard of before in the history of America. Even Republican papers admitted the conditions.

An editorial of *The Nation*, issued March 23, 1871, says, "We owe it to human nature to say that worse governments have seldom been seen in a civilized country. They have been largely composed of trashy whites and ignorant blacks. * * * The great majority of the officers and legislators have been either wanting in knowledge or in principle, or in both."

In another leader, issued March 30th of the same year, the same paper says, "Nothing would satisfy the hot-headed majority in Congress but to drive these men (the Southern leaders) into private life, and hand over the government to ignorant negroes and worthless Northern adventurers."

The Charleston *Daily Republican*, speaking of the appointed officers in South Carolina, says: "Some of them had better hammer stone in the penitentiary than hold office," and, speaking of the elected officers, it says, "many are ignorant and degraded and altogether sold to the devil."

Undoubtedly a few good men came South at the close of the war, but it can be truthfully said of the great mass that no Goth who followed the banner of Alaric to the sack of Rome was a more ruthless destroyer of property, or held in greater contempt the rights of a prostrate people than did the carpetbaggers who followed in the wake of the Federal armies.

A few figures will give some faint idea of the results of this saturnalia of ignorance and corruption. In Mississippi 6,400,000 acres of land, being 20 per cent of the total acreage of the State, was forfeited for taxes, the State tax for 1871 being four times as great as for 1869, that of 1873 eight times as great, and that of 1874 fourteen times as great; State, county and municipal taxes aggregated an amount equivalent to confiscation, and values for taxation were frequently placed by negro boards of supervisors at from two to four times the actual values.

In South Carolina the taxes in 1860 amounted to \$400,000, while in 1871 they amounted to \$2,000,000, though the taxable values had shrunk from \$490,000,000 to \$184,000,000, thus making the rate of taxation almost fifteen times greater. The result was that a large part of the land was forfeited and lay waste or was parceled out among negroes. Notwithstanding this enormous tax, the debt of the State increased from \$1,000,000 in 1867 to \$5,000,000 in 1868 and to \$30,000,000 in 1872.

During the same period the debt of Louisiana increased from \$6,500,000 to \$50,000,000.

The affairs of counties, towns and villages were in even worse condition, most of their officers being negroes, who could neither read nor write, and "who knew none of the uses of authority except its insolence."

The utter bankruptcy of States, counties and cities and their citizens was the least of the evils which prevailed.

Thousands of negroes left the farms and crowded into the towns and villages to live on the bounty of the government and exercise the rights of suffrage and officeholding denied to their late masters; many of them were armed and organized into militia companies, Southern white men being excluded from these bodies; the agents of the Freedmen's Bureau and the judges of the courts were largely prejudiced against the native whites, and frequently profoundly ignorant, and many members of the constabulary were unable to write a return upon a writ; drunken and insolent negroes thronged the streets, and white women were frequently subjected to the vilest insults; Federal troops were quartered in the towns and often used to enforce the malice or caprice of agents of the Freedmen's Bureau and negroes and Northern adventurers; men and women were frequently arrested without warrant or specific charge and carried forty or fifty miles from their homes and imprisoned for indefinite periods without a hearing and finally discharged without even appearing before a judge; a former Governor of Texas recently told me that he was arrested at his home by a file of soldiers and taken to Austin and with much difficulty rescued from them while on his way to the bull pen to be incarcerated with the vilest criminals on the vague charge that he "was an impediment to reconstruction"; while a distinguished member of the Texas bar was trying a case in the District Court at Houston an order reached the District Judge from General Griffin, and, in accordance with its terms, the jury was discharged and twelve negroes, not a one of whom could read or write, were impaneled in its place; in many sections public lectures and newspapers were suppressed; in South Carolina a State judge passed sentence upon a man for theft; General Sickles had the judge arrested and ordered him to revoke the sentence, and, on his refusing to do so, the prisoner was taken from the sheriff by force and set free; General Canby removed a judge from office and appointed a man in his place because he refused to interpret the law in accordance with the views of the military; in Georgia civil officers were arbitrarily removed by General Meade; in Alabama General Wood issued an order prohibiting Episcopal ministers in that State from

performing divine services because the bishop of the diocese (Bishop Wilmer) had recommended that prayer for the President of the United States be omitted from the service; in Mississippi orders were issued by the military forbidding citizens from assembling under any pretense, the Governor of the State and other officers were removed, and the Chief Justice resigned because the Supreme Court was overawed by armed men; the Governor of Louisiana was removed by General Sheridan. These are a few of many such incidents.

Under the regime of the Freedmen's Bureau and the military satrap conditions were bad, but among the agents and military officers were some men of high character and perfect honesty; but after an election, at which United States soldiers stood at the voting boxes and the influential white men of the South were disfranchised, the negro and carpetbagger took complete charge, and it was seen that still darker days were at hand.

The Supreme Court of the United States, that august tribunal intended by the founders of the government as a bulwark against unconstitutional legislation and executive tyranny, had been appealed to in vain. In the case of *Mississippi v. Johnson et al.*, the State of Mississippi, represented by Judges Sharkey and Garland, along with other counsel, asked leave to file a petition for injunction in the Supreme Court to restrain President Johnson and General Ord from carrying out the provisions of the unconstitutional reconstruction acts of Congress. In a short opinion by Chief Justice Chase, the permission was refused on the ground that the court was without jurisdiction. The court rests its decision on two propositions, one being that, as no such application had ever been made to the Supreme Court before, this indicated that it was the general judgment of the legal profession that such an application should not be considered; the other being that the duties imposed on the President of the United States by the acts were not ministerial, but executive and political, and could not be interfered with by the court. The opinion can hardly be classed as convincing, and a doubting Thomas can scarcely refrain from recalling the well-known aspiration of Chief Justice Chase for the Republican Presidential nomination, and the suspicion that John Marshall would have seen a way to stay the hand of the spoiler.

In *Ex Parte Vallandigham*, the court had previously held that it had no power to review the decisions of a military tribunal.

It is not the purpose of this paper to discuss these decisions, but it is the opinion of the writer that between 1862 and 1875 the Supreme Court of the United States shrank from a contest with the dominant legislative branch of the National Government.

During the period referred to, the court was treated by Congress with the greatest contempt, and, when President Johnson insisted on testing his power to remove Stanton as Secretary of War under the terms of the "tenure of office act," by an appeal to the Supreme Court, Congress refused to even consider the proposition, and attempted to impeach the President for refusing to construe the act in accordance with the views of the legislative department of the Government.

Congress had deliberately usurped the powers of the executive and judicial branches, and, in their exercise, would hear to no check from any source, constitutional or otherwise.

In 1867 it seemed that every remedy had been tried in vain and the limit of endurance reached.

Woodrow Wilson, in his *History of the American People*, says: "The white men of the South were aroused by the very instinct of self-preservation to rid themselves, by fair means or foul, of the intolerable burden of government sustained by the votes of ignorant negroes and conducted in the interest of adventurers; governments whose incredible debts were incurred that thieves might be enriched, whose increasing loans and taxes went to no public use, but into the pockets of party managers and corrupt contractors. There was no place of open action or of constitutional agitation, under the terms of reconstruction, for the men who were the real leaders of the Southern communities. Its restrictions shut white men of the older order out from the suffrage even. They could act only by private combination, by private means, as a force outside of the government, hostile to it, proscribed by it, of whom opposition and bitter resistance was expected, and expected with defiance."

The men of the South had seen the last hope from constituted authority dissipated; there remained "nothing less than the corruption and destruction of their society, a reign of ignorance, a regime of power basely used," under which they and their wives and children could hope for no protection of life, liberty or property, and at this point they gathered for resistance.

Curiously enough, fate had prepared a potent weapon, and at the critical moment thrust it into the hands of these desperate and despairing men.

In June, 1866, in the little town of Pulaski, in Southern Tennessee, near the Alabama line, a few young men, finding time hanging heavily on their hands, met in a law office one night and concluded to organize a society of some kind; some one suggested that they call it "Kukloid," from the Greek word *kuklos*, meaning a circle, and some other person present said, "Call it Ku

Klux"; the word "Klan" was then added to complete the alliteration. In order to arouse public curiosity and surround the organization with an atmosphere of mystery, various devices were resorted to; the oath bound the member to absolute secrecy in regard to everything pertaining to the order, and he was prohibited from disclosing the fact that he was a Ku Klux, or giving the name of any other member, or soliciting membership; each member was required to appear at the meetings arrayed in a long robe with a white mask and very tall hat made of white pasteboard; the meetings were held at night in the cellar of a deserted brick house standing on a hill near the town. The officers were a "Grand Cyclops," who presided at the meetings; a "Grand Maji," who was a kind of vice-president; a "Grand Turk," or marshal, a "Grand Exchequer," who acted as treasurer, and two "Lictors," who were the outer and inner guards of the "Den." One of these "Lictors" was stationed in front of the old ruin and another between it and town, both dressed in the hideous regalia of the order and bearing enormous spears. The only business transacted at the meetings was the initiation of new members with the most fantastic of ceremonies, and the only purpose of the order was to mystify outsiders and have fun. During the summer of 1866 the membership rapidly increased, the local papers contained many references to it, and the probable objects of the movement were being generally discussed; young men from the country and neighboring counties were initiated and organized "dens" in their neighborhoods, the same mystery and secrecy being maintained. The red lights and uproar of initiations seen and heard at midnight from graveyards and haunted houses were duly reported and repeated in the negro quarter and among whites of the lower classes with every exaggeration which ignorance and superstition could suggest. Acting on mysterious statements from gigantic shrouded figures who frequented lonely country roads at midnight, it began to be bruited abroad that the Ku Klux were the spirits of dead Confederate soldiers. Travel along the roads on which the ghostly "Lictors" stood sentinel was almost discontinued at night, and even the wisest and least imaginative persons began to wonder what it all meant.

The most remarkable characteristics of the negro race at the present day are their vivid imagination and universal superstition; during slavery and the years immediately following the war, for obvious reasons, these characteristics were much more pronounced than now.

The Ku Klux Klan readily appealed to these people as an incarnation of the powers of darkness, and it was soon noticed that in

neighborhoods where "dens" were actively operating no negro could be induced to budge beyond his doorsill after dark.

The rapidity with which the order spread during the winter of 1866-7 was marvelous, and yet there was still no serious purpose behind the movement and nothing to support it beyond the enjoyment of the initiations and the baffled curiosity of the mystified public. As time went by, however, and the members began to realize the amazing influence of the unknown over the minds and actions of men, and what a power was in their hands, and saw the unexampled rapidity with which the order crossed mountains and rivers and States, they themselves began to be imbued with the idea that some great mission awaited the movement. The discovery of such a mission was not difficult; the need of some drastic remedy for existing conditions was recognized by all, and the terror inspired by the Ku Klux Klan suggested that it might be utilized to protect property and suppress crime and disorder.

At this time there were probably several hundred "dens" in Middle and West Tennessee, and a number in Mississippi and Alabama, but they had no general organization, no means of communication, no supreme authority, and, in fact, they had no need of such things; the idea of using the order as patrols, or "patterrollers," and regulators seemed to spontaneously spring up over the entire region dominated by the "dens," without any consultation, or chance for consultation among the scattered local leaders, and was promptly acted on. As soon as this developed, it was deemed best to perfect a more regular organization, and in the spring of 1867 the "Grand Cyclops" of the Pulaski "den" sent out a request to all dens of which he had knowledge to send delegates to a convention to be held in Nashville; these delegates met secretly without attracting public attention, and adopted a plan of organization. The region in which the Klan operated was to be known as "The Invisible Empire," divided into "Realms," corresponding with States; each "Realm" was divided into "Dominions," corresponding with congressional districts; each "Dominion" into "Provinces," corresponding with counties, and each "Province" into "Dens."

The supreme head of the order was the "Grand Wizard," the ruler of a "Realm" was a "Grand Dragon," that of a "Dominion" a "Grand Titan," that of a "Province" a "Grand Giant," and that of a "Den" a "Grand Cyclops."

A statement of the principles of the order, not for publication, contained the following words:

"We recognize our relation to the United States Government,

the supremacy of the Constitution, the constitutional laws thereof, and the Union of the States thereunder."

The special objects of the order were set out as follows:

"(1) To protect the weak, the innocent, and the defenseless from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal; to relieve the injured and the oppressed; to succor the suffering and unfortunate, and especially the widows and orphans of Confederate soldiers.

"(2) To protect and defend the Constitution of the United States, and all laws passed in conformity thereto, and to protect the States and people thereof from all invasion from any source whatever.

"(3) To aid and assist in the execution of all constitutional laws, and to protect the people from unlawful seizure, and from trial, except by their peers, in conformity with the laws of the land."

The secret Nashville convention gave a still greater impetus to the movement, for the same unbearable conditions existed in almost every Southern community, and the belief that nothing could be hoped for from national or local authorities was prevalent and well founded. In order to more effectively carry out their plans, and deceive the public as to their members, the "Grand Dragon" of the "Realm" of Tennessee issued an order for a general parade in each county seat on the night of July 4, 1867. A faint idea of the impression created can be gathered from the account of an eye-witness of what occurred in Pulaski. "On the morning of that day the citizens found the sidewalks thickly strewn with slips of paper bearing the printed words: 'The Ku Klux will parade the streets tonight.' This announcement created great excitement. The people supposed that their curiosity, so long baffled, would now be gratified. They were confident that this parade would at least afford them the opportunity of learning who belonged to the Ku Klux Klan.

"Soon after nightfall the streets were lined with an expectant and excited throng of people. Many came from the surrounding country. The members of the Klan in the county left their homes in the afternoon, and traveled alone or in squads of two or three, with their paraphernalia carefully concealed. If questioned, they answered that they were going to Pulaski to see the Ku Klux parade. After nightfall they assembled at designated points near the four main roads leading into the town. Here they donned their robes and disguises, and put covers of gaudy materials on their horses. A skyrocket sent up from a point in the town was the signal to mount and move. The different companies met and

joined each other on the public square in perfect silence; the discipline appeared to be admirable. Not a word was spoken. Necessary orders were given by means of whistles. In single file, in deathlike stillness, with funeral slowness, they marched and countermarched throughout the town. While the column was headed north on one street it was going south on another. By crossing over in opposite directions the lines were kept up in almost unbroken continuity. The effect was to create the impression of vast numbers. This marching and countermarching was kept up for about two hours, and the Klan departed as noiselessly as they came. The public was more than ever mystified. The efforts of the most curious to find out who were Ku Klux failed. One gentleman from the country was confident that he could identify the riders by the horses, but, as we have said, the horses were disguised as well as the riders. Determined not to be baffled, during a halt of the column he lifted the cover of a horse that was near him and recognized his own steed and saddle, on which he had ridden into town. The town people were on the alert to see who of the young men of the town would be Ku Klux. All of them, almost without exception, were marked mingling freely and conspicuously with the spectators.

"Perhaps the greatest illusion produced was in regard to the numbers taking part in the parade. Reputable citizens were confident that the number was not less than three thousand. Others, whose imaginations were more easily wrought upon, were quite certain there were ten thousand. The truth is that the number of Ku Klux in the parade did not exceed four hundred."

It is impossible to form any idea of the number of dens or their size. By the fall of 1868 the Klan certainly dominated a large portion of all the Southern States except Virginia and Texas; undoubtedly its membership was large; its tremendous influence can hardly be conceived at the present day, and yet it is probably true that its membership embraced only a minority of the adult males in most of the communities in which it flourished.

There was in reality no supreme authority, little connection between the "Realms," not much more between the "dens" (except those in the same county), and the oaths, passwords, grips and initiation ceremonies were not uniform, but, so far as the writer's investigations have gone, the oath always included an obligation to support the Constitution of the United States and the cause of justice and humanity and to protect widows and orphans; the same general policy was pursued in practically every community and with the same results.

It is safe to say that 90 per cent of the work of the Klan in-

volved no act of personal violence. In most instances mere knowledge of the fact that the Ku Klux were organized in the community and patrolled it by night accomplished most that was desired; in case the nocturnal political meetings of the negroes, organized by scallawags and carpetbaggers, proved disorderly and offensive, sheeted horsemen would be found drawn up across every road leading from the meeting place, and, though not a word was spoken, and no violence whatever offered, that meeting usually adjourned *sine die*; sometimes the entire Klan was divided into smaller bodies, which rode all night, appearing in negro quarters distributed over a large section of country, and usually maintaining absolute silence and molesting no one. In case a negro became insolent or dangerous, he was likely to be visited by a mounted spectre some twelve feet high, who asked for water, drank a bucket full with the remark that it was the first he had tasted since he was killed at the battle of Shiloh, extended a skeleton hand, or what appeared to be his skull, to his unwilling host, and departed with the suggestion that he would call again in case the owner of the cabin did not improve his manners. No one who was not raised among negroes can form the slightest conception of the potency of these methods.

In dealing with objectionable characters among the whites, mysterious communications, sealed with skull and crossbones, were usually pinned upon their doors at night, warning them to mend their ways or leave the country.

In many instances all the officers of a county were notified that it was time for them to depart, and they did so with no unnecessary delay.

There lives in the Capital City of Texas an honorable member of our profession, who has held for many years one of the highest positions within the gift of the State, who organized every "Den" in the State of Florida. I have his word for it that not one single act of personal violence was committed by any one of these "Dens." Their most noteworthy achievement was the destruction of the entire shipment of guns sent from the North to arm the negro militia of the State. Every telegraph operator, brakeman, engineer and conductor on the road over which these arms entered the State was a Ku Klux; the shipment was watched at every point, and between Lake City and Madison, Florida, the entire two carloads of guns were thrown from the moving train by night by a select band of Ku Klux under the personal command of this gentleman, who had quietly boarded the train at its last stop. The Ku Klux left the train at the next station and destroyed the shipment before it was missed, and this notwithstanding the fact that two coaches

filled with United States soldiers, sent to guard the arms, were attached to the same train. I am informed by one who participated in the movement that when the 1500 stand of arms intended for the negro militia of Arkansas left Memphis on the steamer "Hesper," it was overtaken by a tug and the entire shipment broken and thrown into the river.

The men who committed these acts may be condemned by some as lawless, but the destruction of tea in Boston Harbor by comparison becomes rank piracy.

But masked riders and mystery were not the only Ku Klux devices; carpetbaggers and scallawags and their families were ostracised in all walks of life; in the church, in the school, in business, wherever men or women, or even children, gathered together, no matter what the purpose or the place, the alien and the renegade, and all that belonged or pertained to them, were refused recognition and consigned to outer darkness and the companionship of negroes.

In addition to these methods there were some of a much more drastic nature; the sheeted horsemen did not merely warn and intimidate, especially when the warnings were not heeded. In many instances negroes and carpetbaggers were whipped, and in rare instances shot or hung. Notice to leave the country was frequently extended and rarely declined, and, if declined, the results were likely to be serious. Hanging was promptly administered to the house burner, and sometimes to the murderer; the defamer of women of good character was usually whipped, and sometimes executed if the offense was repeated; threats of violence and oppression of the weak and defenseless, if persisted in after due warning, met with drastic and sometimes cruel remedies; mere corruption in public office was too universal for punishment, or even comment, but he who prostituted official power to oppress the individual, a crime prevalent from one end of the country to the other, especially in cases where it affected the widow and the orphan, was likely to be dealt with in no gentle way, in case a warning was not promptly observed; those who advocated and practiced social equality of the races and incited hostility of the blacks against the whites were given a single notice to depart in haste, and they rarely took time to reply.

I have in my possession a letter recently received from one who in his young manhood was one of the advisers and leaders of the Klan in East Mississippi, and who subsequently for years served his State with distinction in the National Congress. I quote this language of his, worthy of all acceptance: "No victim of their

displeasure ever suffered without first a full and ample investigation of his case, *ex parte*, 'tis true, but all the facts were first found out and thoughtfully weighed, for and against him, and the sentence carefully considered and made commensurate with the justice and necessity of the case. They made the punishment suit the crime." Where good men controlled little real injustice was done, but in many instances "Dens" were dominated by the reckless and the cruel. These men committed crimes equal to, or worse than those the movement was intended to suppress, and ultimately brought the greatest reproach upon the order. The writer, after going over a very large amount of data, including a hurried perusal of some thirteen volumes devoted by the committees of Congress to the subject, has become fully convinced that in a vast majority of cases the victims of the Ku Klux Klan received just about what they were entitled to.

On account of the secret character of the Klan, it was impossible for it to defend itself against many false accusations. Violence and crimes with which it had no connection were constantly charged to it, and it is well known that many arrests were made of lawless persons clothed in the Ku Klux disguise, who did have, and could have had no connection whatever with the order.

"But the Invisible Empire, however its sway was exercised, was a real empire. Wisely and humanely, or roughly and cruelly, the work was done. The State governments, under carpetbag control, made little headway with their freedmen's militia against the silent representatives of the white man's will." Acts of Congress and proclamations of President Grant, backed by the army of the Nation, were not sufficient to meet the desperate onset of men who, armed with crude weapons, were making what seemed to them the last stand for all they held sacred.

Time is not allowed to review the history of the order in the different States; in some it lasted much longer than in others, because the conditions it was intended to remedy lasted longer.

In September, 1868, Governor Brownlow called the Legislature of Tennessee together and had an act passed comparable only to the reconstruction acts of Congress. By its terms association or connection with the Klan was punished by a fine of \$500 and imprisonment in the penitentiary for *not less than five years*; every inhabitant of the State was constituted an officer with power to *arrest without process* anyone known to be, or suspected of being, a Ku Klux; to feed, lodge, entertain or conceal a Ku Klux subjected the offender to a fine of \$500 and imprisonment for five years, and informers were offered one-half of the fine.

Notwithstanding these drastic provisions, the Ku Klux continued to actively operate in Tennessee for about six months thereafter. In the latter part of February, 1869, the "Grand Wizard," a citizen of Tennessee, issued a proclamation to his subjects, reciting the legislation against the Klan, stating that the order had now largely accomplished the purposes for which it had been organized; that the civil law now afforded adequate protection to life and property; that robbery and lawlessness were no longer unrebuked; that the better elements of society were no longer in dread for the safety of their property, persons and families; that the "Grand Wizard" had been invested with power to determine questions of paramount importance, and, in the exercise of the power so conferred, he declared the Klan dissolved and disbanded. It is believed that the "Grand Wizard" was no less a personage than Nathan Bedford Forrest. As the possessor of dauntless and sustained courage, resourcefulness and a grim disregard of all consequences, no more ideal leader of such a movement ever appeared upon the American stage. This proclamation was addressed to all "Realms," "Dominions," "Provinces" and "Dens" of the "Empire," but it had little effect beyond the borders of one State. Tennessee was the first Southern State in which constitutional government was restored and the scheme of reconstruction abandoned. The writer is satisfied that as late as 1872 the Klan was a potent factor in other States.

For several years after the Ku Klux, as such, had abandoned their organization, practically the same movement was kept up under the names of "Constitutional Union Guards," "Pale Faces," "White Brotherhood," "White League," and "Knights of the White Camelia." As a general thing, the work done by these later organizations was more reckless and violent in its character, there was less justification for it after 1872, and more bloodshed resulted than grew out of the operations of the original movement.

As a general rule, this grim protest against unbearable conditions disappeared with the worst of the conditions, *and not sooner*.

In 1870, 1871, and 1872 the Ku Klux Klan consumed a large part of the attention of Congress, the President, and the army of the United States; investigating committees visited every section of the South, many volumes of testimony were compiled, hundreds of speeches were made, martial law was declared in some instances, and proclamations issued in others, still more drastic laws were passed; but, in the face of all this, the movement relentlessly moved on to the accomplishment of its purposes.

The Senate investigating committee and the joint committee of

the two Houses of Congress each presented majority and minority reports; the first to the effect that a conspiracy existed in the South, of a political nature, against law and the negro; the second, that misgovernment and criminal exploiting of the country by the reconstruction leaders had provoked natural resistance.

The great debates in Congress and the press of the country began to educate the people as to the awful conditions which had prevailed, and the revolution resorted to as a remedy.

In 1872 Congress passed an act restoring the right to vote and hold office to the real leaders and capable men of the South, the worst conditions had disappeared, the troops had been withdrawn, and what was known in the North as "The Great Ku Klux Conspiracy" was at an end.

Just how much the acts of Congress and of the President had to do with the disappearance of the order it is hard to say, but the scallawag and the carpetbagger disappeared about the same time, and it might be said that the purposes of the Klan had been substantially accomplished. The belief of most people in the North that the movement was organized and controlled by roughs and criminals associated together for the commission of crime and bent on re-enslaving the negro and driving his Northern protectors from the South, is not sustained by the facts. The men who engaged in this movement were largely of the very best.

The leading editorial in *The Nation* of March 30, 1871, speaking of the ignorance and corruption of the carpetbag regime, says:

"We might be told that phenomena like these may be witnessed in New York, which is true. But in New York no one is disfranchised, and we may add that, were decent people in New York hot-blooded, like the same class in South Carolina, and did they believe, as the South Carolinians do, that Ku Kluxing would work reform, they would be busy at it day and night, and many a hardened ruffian would be yelling for Federal troops to save him from the consequences of his villainy. We say deliberately, too, that we believe a community which sits down, as we do, under some of the evils from which we here suffer and of which we hear every day, is doubtless wiser than the South Carolinians, but it is very doubtful whether it is healthier in spirit. We seek neither to defend nor palliate Ku Kluxes, but we can not allow the persons who sow the seeds from which Ku Kluxery naturally springs to throw the whole blame on the men who engage in it."

Speaking of the typical Southern man of that day, Daniel H. Chamberlain, the reconstruction ruler of South Carolina, said: "I consider him a distinct and really noble growth of our Ameri-

can soil. For, if fortitude under good and under evil fortune, if endurance without complaint of what comes in the tide of human affairs, if a grim clinging to ideals once charming, if vigor and resiliency of character and spirit under defeat and poverty and distress, if a steady love of learning and letters when libraries were lost in flames and the wreckage of war, if self-restraint when the long-delayed relief at last came; if, I say, all these qualities are parts of real heroism, if these qualities can vivify and ennoble a man or a people, then our own South may lay claim to an honored place among the differing types of our great common race."

Such was the matured judgment of the Massachusetts Governor of South Carolina during the reconstruction period in regard to the class of men who organized and chiefly dominated the Ku Klux Klan, and there is nothing I would wish to add to it.

Did the end aimed at and accomplished by the Ku Klux Klan justify the movement? The opinion of the writer is that the movement was fully justified, though he, of course, does not approve of crimes and excesses incident to it.

The abuses under which the American colonies of England revolted in 1776 were mere child's play compared to those borne by the South during the period of reconstruction, and the success of the later movement as a justification of a resort to revolutionary methods was as pronounced as that of the former.

Whatever may be your views, I leave the question with you, repeating the proposition with which I began, that, amid conditions as they existed in the South from 1866 to 1872, scarcely a man in this audience would have been other than a Ku Klux or a Ku Klux sympathizer.

From the nightmare of reconstruction and Ku Kluxism two things have been born which have wrought incalculable injury to the South and may continue to do so for a century to come. One of these is the "*Solid South*," and the other is "*contempt for law*."

The brutality and senselessness of the great wrong of reconstruction can not be forgiven or forgotten. It welded every element of the South into eternal opposition to a political party; it made adherence to that party moral, social and political treason; it made it impossible for us to divide on any issues of expediency, or even of right and wrong, and, to sum it all up, it made it impossible for a Southern born and bred man to vote the Republican ticket and go home and face his wife and children.

The other injury was greater still, for the vicious unconstitutional laws and our defiance of them left the South with no proper respect for constituted authority, with a disposition to right our

own wrongs, and a contempt for all law not to our liking. This last is our crowning inheritance of woe for which our children and our children's children will suffer.

The Ku Klux machine has been stored away in the Battle Abbey of the Nation, as obsolete, we trust, as the causes which produced it; it will stand there for all time as a reminder of how useless is the prostitution of forms of law in an effort to do that which is essentially unlawful; but it will also remain an eternal suggestion to the vigilance committee and the regulator.

TWO PERIODS IN THE HISTORY OF THE SUPREME COURT.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 11, 1906,

BY

MR. JUSTICE DAVID J. BREWER.

There have been two periods in the history of the Supreme Court, one prior to the Civil War, which may be called the period of national stability, and one subsequent thereto, that of national enlargement. When I speak of these as periods in the history of the court, I do not mean that either was the result solely of judicial action, that the court created them independently of the other branches of the government and of the people themselves, and of its own volition established these two, in some respects quite distinct, periods of judicial life. For, after all, notwithstanding the independence of judicial tribunals and however much at different times they may temporarily, at least, stay the action of the people speaking through the executive and legislative branches of the government, in the last analysis the court largely reflects the popular judgment, not its hasty opinion, but that which is the result of deliberate and well-considered thought. And yet the power of the Supreme Court in incarnating into the constitutional life of the nation the thoughts and purposes of the people, sometimes, indeed, going in advance of popular recognition, makes its action not only reflex, but also an indication of the development of popular government.

The first period, that extending to the time of the Civil War, may, as I said, be called the period of national stability. Prior to the formation of the Constitution the Thirteen Colonies formed simply a confederacy. There was but a league of thirteen inde-

pendent sovereigns, entrusting a limited amount of authority to a so-called central government, a government which acted not so much upon the people directly as upon the members of the league, and whose conclusions in reference to what was best for the States as a whole were often thwarted and likely to be thwarted by the independent action of any of the members of the confederacy. I need not stop to point out how unfortunate that attempt at government was. We all know that many of the wisest men of the time became despondent of the future, perceiving the growth of jealousies between the States, the inability of the confederacy to check that growth, and apprehensive that the solidarity of a single nation would never come, but that our strength would be wasted in quarrels between individual States. In the midst of these days of darkness and doubt the national Constitution was formed and submitted for adoption. It was a magnificent conception of government. It gave birth to a nation, and yet the jealousies of the several States found expression in its language. Only defined powers were given to the new government, and before the adoption of the new Constitution could be secured by the requisite number of States, assurances had to be made, which were afterwards fulfilled, of a series of amendments, one in particular reserving to the States and the people thereof the powers not expressly granted to the national government.

This new Constitution was susceptible of two different lines of construction, one proceeding on the thought that there was simply an improvement of the confederacy—an agreement between the States to make their league more efficient without destroying the autonomy of the States; the other proceeding upon the theory that a new nation was created by the people of the Thirteen States, a nation within whose limits were thirteen communities retaining local government, which, while supreme in that local government, were in all matters affecting nationality subordinate to and dependent upon the single new government.

To the two different views thus presented the attention of the Supreme Court was early directed. Perhaps the first distinct response is to be found in the case of *Chisholm v. Georgia*, 2 Dall., 419, in which the court held that it had jurisdiction to summon to its bar one of the States to answer to the suit of an individual, a citizen of another State. This interpretation of the powers vested by the Constitution in the judicial branch of the government was promptly repudiated by the people in the Eleventh Amendment. But the underlying difference between these two thoughts could not be kept out of the scope of judicial consideration, and when John Marshall took his place on the Supreme

bench and began that long career which has made his name without a peer in the judicial history of this country and with scarcely a rival in the judicial history of the world, case after case was presented which involved a consideration of these antagonistic views.

We have been so accustomed to accept the conclusions reached by the court and announced in a series of elaborate opinions by Chief Justice Marshall, that, to many of the present day, it seems that there never was a debatable question, but to one who has studied the arguments and debates of those times the contrary is very evident. I have no desire to enter into the discussion, but let me call your attention to these facts. In the Constitution the term "United States" is used only in the plural number. Treason against the United States "shall consist only in levying war against *them* or in adhering to *their* enemies." The Senate is composed of two Senators from each State, chosen by the Legislature thereof. The presidential electors are appointed by the State, in such manner as the Legislature thereof may direct. Even members of the House of Representatives, who are the only officers named in the Constitution to be elected by the people, are chosen "by the people of the several States." I do not mean to intimate that I think the construction reached by Mr. Chief Justice Marshall and his associates was wrong. On the contrary, I think it was right. The Constitution, as its preamble declares, was ordained and established by "the people of the United States," and the whole scope of the powers granted indicates the establishment of a nation with supreme though enumerated powers. A curious fact is that in the early official utterances of the government the term "United States" is always used in the plural number, but of late we are coming to use it as a collective and singular noun. It used to be said "the United States are," but now it is "the United States is." Among the great judicial opinions of Chief Justice Marshall may be noticed *Brown v. Maryland*, 12 Wheat., 419, in which the supreme control by the nation over importations from foreign countries, with a consequent limitation on the power of the States to impair the value of those importations by license taxes or otherwise, was sustained; *McCulloch v. Maryland*, 4 Wheat., 316, upholding the power of Congress to incorporate a national bank, and in which the true significance of the word "necessary" in the last paragraph of Section 8 of Article I of the Constitution was defined—a definition which gave to Congress a discretion in the means by which the specific powers were to be put into effect; *Gibbons v. Ogden*, 9 Wheat., 1, affirming the supreme power of Congress over commerce between the States, a supremacy which

carried with it the right to control the navigable waters, although such waters were within the limits of a State; the Dartmouth College case, 4 Wheat., 518, in which the prohibition upon the States of passing any laws impairing the obligations of contracts was given a force and stability, the value of which to the nation can never be overestimated; *Osborn v. Bank*, 9 Wheat., 738, in which the inability of the States to burden any of the operations or property of the nation by taxation or otherwise was affirmed; *Cohens v. Virginia*, 6 Wheat., 264, in which the supervising power of the Supreme Court of the nation over the tribunals of the States was placed upon a subsequently unchallenged foundation. When Chief Justice Marshall died and was succeeded by Chief Justice Taney, it was thought by many that a change would come in the rulings of this court and that its interpretation would proceed along the other line of construction, but in *Ableman v. Booth*, 21 How., 506, Chief Justice Taney, speaking for the court, declared that the processes of the courts of the nation could not be set aside or disregarded by any State tribunal. In the *Genessee Chief*, 12 How., 443, he apparently enlarged the admiralty jurisdiction of the United States, limiting it no longer by the flow of the tide, but by the navigability of the waters; and even in the *Dred Scott* case, 19 How., 393, which at the time provoked so much hostile criticism, he affirmed the far-reaching power of the Constitution. It is no more than justice to say that while for a time, growing out of the bitter antagonisms of the war, the fame of Chief Justice Taney was temporarily obscured, today, by the common consent of the lawyers and judges of the land, he is regarded as a most worthy successor to the great Chief Justice, and his opinions will stand monumental in the judicial history of this nation.

And here may I pause to state a fact which doubtless is unknown to most of you. Justice Miller, a native Kentuckian, in early manhood left his State because of his radical anti-slavery views and moved to the State of Iowa. From that State he was appointed to the Supreme Court. More than once have I heard him say that, "When I went to Washington I was filled with the most intense prejudice against Chief Justice Taney by reason of his *Dred Scott* decision, and I thought we should be in constant antagonism, but after serving with him a year or two my opinion of him entirely changed. I found him to be a gentleman in the fullest sense of the term, thoughtful and considerate of the opinions and feelings of others, a true patriot, sincerely devoted to the Constitution and ever seeking the welfare of the Republic. Never have I met one who stated the question in a case more fairly,

clearly, succinctly and accurately. I learned to love and admire him and believe that he is worthy to be placed close to the summit of the roll of American jurists." Let me add that before his elevation to the bench he was, as a practicing lawyer in Maryland, one of the most constant and earnest defenders of the negro, free or slave, against oppression and injustice; that he freed all his own slaves except one or two who were too old to take care of themselves; that the burden of complaint has been a sentence erroneously asserted to be a declaration of his own views when it was only a statement of the public opinion existing at the date of the adoption of the Constitution. Surely all must rejoice that justice, though tardy, is at last placing his name where it belongs, second only to that of John Marshall.

I have not time to go into these cases more in detail, but the bare statement of the questions presented and the conclusions reached indicates that during this period the Supreme Court was gradually and yet steadily establishing the supremacy of the nation. Its stability, its supremacy, were in these and other cases again and again affirmed, so that it may be said that the whole sweep of the judicial life of the Nation up to the time of the Civil War was towards that permanence and stability.

But all discussion was ended by the Civil War. The arbitrament of arms sustained John Marshall. From that time on all write nation with a capital N. One period of constitutional exposition reached its climax. Since then we have been moving along a new period—a period in which the tendency is to an enlargement of national and at the same time governmental power. Undoubtedly the thought of many is the practical elimination of the States from the possession of any sovereign power. They would obliterate State lines, making of States little more than large county organizations dependent for the extent of their power upon the will of the single sovereign nation. This being the thought of many, let me notice how it has been received by the Supreme Court, as well as, incidentally, how far it has affected legislative action.

The effort for the establishment of a new nation by the Confederate States was regarded by many as an act of suicide by them so far as their relations to the Union were concerned. They had ceased to be States of the Union, were to be treated as conquered provinces and their future determined absolutely by the will of Congress irrespective of any past relations to the Union. While this thought was insisted upon by many there came the decision of the Supreme Court in the case of *Texas v. White*, 7 Wall., 700, in which Chief Justice Chase made the notable declaration that "the Constitution, in all its provisions, looks to an indestructible

Union, composed of indestructible States." Whatever of convulsion, disturbance, revolution may exist in any one of the States of the Union, this declaration affirms the indestructible character of the States, a permanence as real as that of the Union itself.

The first tangible effective action looking to an enlargement of the national power and a consequent restriction upon the sovereignty of the States is to be found in the post-bellum amendments; the Thirteenth, prohibiting slavery and involuntary servitude; the Fourteenth, defining citizenship and restraining the States from any legislation depriving one of life, liberty or property without due process of law or denying to anyone the equal protection of the law; and the Fifteenth, forbidding a denial of the elective franchise on account of race, color or previous condition of servitude. The scope of these amendments has been repeatedly presented to the Supreme Court.

Taking the first, the Thirteenth Amendment, it was early and vigorously contended that its effect was to transfer to Congress the full police protection of the recently enfranchised slaves. Legislation of Congress ran along that line, as seen in the Civil Rights bill, but in a series of cases from the Civil Rights cases, 109 U. S., 3, up to the recent decision of *Hodges v. United States*, 203 U. S., —, the Supreme Court has ruled that the plain meaning of the Thirteenth Amendment is the prohibition of slavery or involuntary servitude—well-understood conditions existing here before the war and elsewhere through the world, both before and since—and vesting in Congress only the power to prevent the re-establishment of such conditions anywhere within the jurisdiction of the nation. It was held that it did not operate in favor of any race to transfer the general police power which before the war was, in respect to all individuals, unquestionably vested in the States.

The second of these, the Fourteenth Amendment, has been since its enactment prolific of more litigation in the Supreme Court than any other part of the Constitution. It was early contended that it vested in the Federal courts a supervision of practically all legislation and judicial action by the several States. But that sweeping claim was repudiated in the *Slaughter House* case, 16 Wall., 36, and by that and many other cases national inquiry has been limited to the question whether any legislation or judicial action on the part of the States distinctly contravenes the provisions of that amendment and operates to deny to anyone the equal protection of the law or to deprive him of life, liberty or property without due process of law. The last of these, the Fifteenth Amendment, has not as yet received great consideration.

Questions have arisen and an effort has been made in different cases to bring it distinctly before the Supreme Court for determination, but its full scope has not yet been determined.

While it may be said that the decisions thus far have been in restraint of the transfer by virtue of these amendments of the entire sovereignty of the States, yet the amendments themselves increase the power of the nation and give it a larger control over the internal life of the Republic and to this extent tend to increase the one at the expense of the other. It must not be supposed that during this second period there has been any lessening on the part of the Supreme Court of a vigorous assertion of national stability. On the contrary, the rulings made in the first period have been reaffirmed and added to. And in upholding the provisions of the recent amendments it has necessarily given a wider reach and an increased efficiency to the powers of the national government. Thus, in the Virginia Coupon cases, running from *Hartman v. Greenhow*, 102 U. S., 672, to *McCullough v. Virginia*, 172 U. S., 102, the clause of the Federal Constitution prohibiting legislation by a State impairing the obligation of contracts was enforced against the State to the extent of giving vitality and vigor to its bonded obligations, and this in face of adverse rulings by the State Court of Appeals. In the *Debs* case, 158 U. S., 564, the complete supremacy of Congress over interstate commerce, so often asserted by Chief Justice Marshall and his associates, was reaffirmed and the power declared to be in the Nation to keep interstate highways open for the transportation of the mails and the commerce of the land as against all violent disturbances. In *Leisy v. Hardin*, 135 U. S., 100, this same power was held potent to set at naught legislation of the States prohibiting the importation and subsequent sale of intoxicating liquors. In *Brennan v. Titusville*, 153 U. S., 289, the same national control was again asserted and applied to different forms of State interference. In the *Lottery* case, 188 U. S., 321, it was held sufficient to justify Congress in prohibiting the transportation of lottery tickets from one State to another, and this irrespective of the laws of the State in respect thereto.

It will doubtless be suggested, on the other hand, that in the Income Tax cases the validity of the income tax law was denied, but it must be borne in mind that the denial was not of power to impose an income tax generally, but of one dependent directly upon the rents, issues and profits of real or tangible personal property, and this upon the proposition that a tax upon the rents, issues and profits was equivalent to a tax upon the property from which the rents, issues and profits were derived, and, therefore,

within the limitation of Section 9 of Article 1 of the Constitution that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration thereinbefore directed to be taken." I know this decision was reached by only a bare majority and has been often seriously criticised, but it must be remembered that it reserves to the States full control over tangible property for purposes of State taxation and at the same time prevents a combination of the many States to load this kind of a tax upon the people of a few. As a genial friend living in the State of Arkansas once said to me, the people of Arkansas are all in favor of the law because no one of them has an income above that exempted by its terms and are perfectly willing that such a tax should be paid by the citizens of New York, adding that the people of Arkansas were as patriotic as Artemus Ward during the Civil War, who was willing that all his wife's relations should be drafted into the service. It is also true that in *Fairbank v. United States*, 181 U. S., 283, it was held that a stamp tax on an export bill of lading was beyond the power of Congress. But this was simply in the enforcement of the express language found in the section above quoted that no tax or duty shall be laid on articles exported from any State.

Let me now call your attention to cases which give a broader scope to the powers vested in the national government and consequently work a restraining influence on the limitations named in the Tenth Amendment. Take, for instance, the *Legal Tender* cases, 12 Wall., 457, and 110 U. S., 421. It has been often said that this is a government of enumerated powers. That is, that a nation having been created by the Constitution the powers vested in its government were named. The last clause of Section 8 of Article 1, which article names the powers conferred upon Congress, also gave to it authority to enact all laws necessary to carry into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof, and it was held by the court in *McCulloch v. Maryland*, 4 Wheat., 316, that that gave to Congress a discretion as to the means by which the powers conferred were to be carried into execution, saying: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (P. 421.)

The idea was that all the powers vested were named, but that in the exercise of those powers Congress had a discretion as to the means by which they were to be carried into effect and might

pass laws not inconsistent with the Constitution which were appropriate for carrying them into execution. Now in the first of the *Legal Tender* cases cited it was said by Mr. Justice Strong that: "It is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly or directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred." (P. 534.) And by Mr. Justice Bradley: "The United States is not only a government, but it is a national government and the only government in this country that has the character of nationality. * * * Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of the adoption of the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." (Pp. 555, 556.) And in the second of the cases, by Mr. Justice Gray, that: "The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the Legislature, according to the distribution of powers under their respective Constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. * * * The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States."

The theory here expressed is substantially that, as by the Constitution a nation was created, all the powers inherent in national sovereignty as understood at the time of the adoption of the Constitution were vested in the national government except as expressly prohibited. But under that construction, what becomes of the Tenth Amendment, which declares that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

What powers are reserved to the States or to the people which are not reserved in any constitutional monarchy? Why the

enumeration in the several clauses of Section 8 of Article 1 of specific powers granted to Congress, if all the powers of national sovereignty are vested in the government? Can it be said that this is a government of enumerated powers if by the one fact of the creation of a nation all the powers of national sovereignty as then understood are vested in the government? In the Chinese Exclusion case, *Fong Yue Ting v. United States*, 149 U. S., 698, this doctrine was again elaborated, and after showing that the power of expelling aliens was recognized as belonging to nations, it was said by Mr. Justice Gray (pp. 711, 713): "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective. * * * The power to expel or exclude aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress."

But more significant than all are the recent Insular cases, reported in 182 U. S. It is true the majority did not agree in those cases upon the reasons for the conclusion, but it was said by Mr. Justice Brown (p. 279): "We are also of the opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed 'the American Empire.'"

Mr. Justice White filed an elaborate opinion, which was concurred in by Mr. Justice Shiras and Mr. Justice McKenna, while a third opinion was filed by Mr. Justice Gray. It would be a waste of time to attempt to point out the differences between them or what seem to be the inconsistencies. It is enough for the purposes of my thought today to note the fact that all agree in the result that the national government has power to acquire and hold subject to colonial control territory outside the limits of the organized States. And yet I must be permitted to notice one matter. In *Gibbons v. Ogden*, 9 Wheat., 1, 188, Chief Justice Marshall wisely and truthfully said: "As men whose intentions require no concealment, generally employ words which most directly and aptly express the idea which they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

Now I submit this inquiry: Did the candid, intelligent men who drafted this Constitution and the people who adopted it, hav-

ing just finished a seven years war to free themselves from colonial subjection to Great Britain, intend to vest in the government they were creating the power to hold other territory in like colonial subjection? I can but look upon it as an imputation upon either the integrity or the intelligence of the framers of the Constitution that this nation should establish for other lands that same colonial subjection to relieve themselves from which had been waged such an earnest and exhausting war. I refer to these cases as illustrative of the disposition to build up the power of the national government at the expense of the people.

Another illustration: At the time of the adoption of the Constitution it was universally held, both in England and in this country, that admiralty jurisdiction stopped with tide water. But in the *Genessee Chief*, 12 How., 443, the Supreme Court, speaking through Chief Justice Taney, held that tide water was named as the limit because that was the extent to which ocean commerce could be carried, but that as, after the discovery of steamboats, it could be carried up our great rivers the jurisdiction would extend so far as that commerce went. In the *Robert W. Parsons*, 191 U. S., 17, the court went further and held that the Erie canal was a part of the navigable waters of the United States, and that a lien for repairs on a canal boat engaged in traffic on that canal was wholly within the jurisdiction of the admiralty courts and could not be enforced in the courts of the State by direct proceedings *in rem*. Here was a boat which could not be engaged in any ocean commerce, navigating an artificial highway made by the State, and yet a lien created by State legislation for repairs on that boat while thus engaged in local traffic could be enforced only in the courts of the nation.

Still another illustration may be found in *Workman v. New York City*, 179 U. S., 552. Notwithstanding the substantially universal rule laid down by the courts of this country that no private action can be maintained against municipal corporations for an injury caused by the negligence of members of its fire department when engaged in the performance of their official duties, it was decided that in admiralty a fire-boat belonging to the city of New York could be held responsible for damages caused by the negligence of those in charge of it.

Have I erred in calling this post-bellum period one of national enlargement? Has not the manifest tendency been to increase and centralize power in the national government and to that extent diminish the sovereignty of the States, and is not the result what might have been expected? Was there ever seen such a mad scramble on the part of every one believing in the existence of

some legal wrong for congressional legislation in redress? Trademarks, divorces, polygamy, insurance, supervision of corporations, inspection of factories, all are crowded upon Congress and an appeal made to it for action, and when some of the legislation which is proposed proves to be in conflict with previous decisions of the Supreme Court the effect of these decisions is sought to be obviated by subterfuges of legislation. I said five years ago, and the truth has not diminished with the passing years, that Washington is the great lobby camp of the world. Hotel-keeping in Washington while Congress is in session is a bonanza. It is true it is only like a pocket found in a mine which is fabulously rich until the pocket is exhausted and then the mine left barren and worthless, for when Congress adjourns the bonanza disappears.

But this is not the worst. Such a variety of legislation is thrust upon Congress that it is absolutely impossible for the representatives of the people as a whole to consider it. It has to be distributed among committees and the reports of the committees become the basis of legislative action. So that it is profoundly true that congressional legislation today is not legislation by the representatives of the people, but by committees of such representatives. And as the nation grows and its industries and wants become more varied the burden on Congress will continue to increase if this tendency towards centralization is not stayed.

This enlargement of the powers of the national government is not to be regarded as the mere result of judicial action. It is an expression of the thought and desire of many, a thought and desire which took partial shape in the three post-bellum amendments, and which is very clearly shown both in the newspaper press and in the character of legislation which is constantly pressed upon the attention of Congress. There is also an evident attempt through public opinion thus formed to induce the Supreme Court to further this national enlargement. I noticed in the papers a statement attributed to a distinguished lawyer in New York that the Supreme Court was the great power in the nation for the amendment of the Federal Constitution. We often hear the declaration that something more than a knowledge of the law is necessary for a successful judge; that he should be endowed with the spirit of constructive statesmanship. By this and other ways there is expressed the thought that the new conditions of life call upon the court to give a new and different meaning to the language of the Constitution, a meaning larger and broader than that which, according to the rule so clearly stated by Chief Justice Marshall, was the meaning of the framers of the Constitution and the founders of the government. It is urged that this is one

nation, that in order that it fulfill its functions as a world-power it must have all the powers which other nations possess, that law is but a reflex of public opinion and if public opinion requires an enlargement of or an addition to the powers of Congress above and beyond those named in the Constitution, the court must sanction the legislation to accomplish that end. If this tendency increases and the court responds to that kind of suggestion it will not be long before it will become impossible to say that this is a government of enumerated powers, but, on the other hand, it will be a government with all the powers vested in the legislative and executive authorities of any nation; and the Tenth Amendment, which reserves to the people what they have not in terms granted, will become a voiceless and unmeaning part of the Constitution.

I know that there are changed conditions and a different social and business life from that which obtained when the Constitution was framed. It may be that new laws are necessary, possibly amendments to the Constitution, but it must always be remembered that this is a government of and by the people; and if additions and changes are necessary, let them be made in the appointed way. Never let the courts attempt to change laws or Constitution to meet what they think present conditions require. When they do this, they clearly usurp powers belonging to the Legislature and the people.

I fully believe that this nation as a nation has all the powers which any nation possesses, but I as fully believe that those powers are vested in the people and that only such as they have enumerated in the Constitution have they granted to the government. If they deem that further powers should be vested in that government the Constitution provides its own way of amendment, and it will be a sad day when the court is found assenting to the proposition that it has the right to enlarge the terms of that instrument. I do not mean to intimate that the decisions to which I have referred have all been unwarranted exaggerations of the powers of the national government, nor do I mean to intimate that the matters to which I may hereafter refer are all of them beyond the reach of congressional action, but I have called attention to them and I want to call attention to other pending measures as indicating the tendency and drift of judicial decisions and legislation.

There is a very general belief that uniformity in the legislation of the several States upon most matters is desirable, and because that can not be easily obtained by direct action of the States the pressure is upon Congress for such action as will tend to bring it about. Take insurance. This has been repeatedly held by the Supreme Court not to be a part of interstate commerce

and only a matter of local law, but there has been an effort to have Congress assume jurisdiction over it by virtue of its power over interstate commerce, and when doubts have been asserted as to the constitutionality of a direct assumption of such power, it has been urged that licenses be issued by Congress to such insurance companies as will accept the terms of congressional action and submit to congressional control; the thought being that this added guaranty of solvency will prompt them, although State incorporations, to accept the provisions of congressional legislation and thus become subject to congressional control.

Further, there is a constant effort to see if in some way the national power can not be exercised in reference to marriage and divorce. While it has been repeatedly held that new States upon their admission into the Union stand on a perfect equality with those already existing, it has been often and successfully contended that the admission of a new State shall be conditioned upon a contract entered into between the national government and the incoming State which will tie the hands of the latter and enlarge the powers of the former. The Constitution gives to Congress the exclusive regulation of commerce between the States as well as between this country and foreign nations, but who can now say, in view of legislation and judicial decision, at what period of time interstate commerce begins and where it ends? If we listen to the contentions of some we shall be led to believe that when the farmer sows his wheat, having in view the gathering in of the Fall of a crop of grain, which he intends to sell to a mill in some other State, the power of Congress attaches as upon a beginning of interstate commerce and continues until the wheat has been manufactured into bread and eaten by the consumer. The Constitution says that no person shall be a Senator of the United States who is not 30 years of age, nine years a citizen of the United States and, when elected, an inhabitant of the State for which he shall be chosen. Now the contention is that, although these are the only qualifications named in the Constitution, the Senate can attach other and different qualifications. Because a manufacturer may intend to dispose of some of his products in interstate traffic, it is said that Congress has the right to supervise the entire action of his manufacturing establishment. Inasmuch as it is difficult to draw the line in our great industries between that commerce which is wholly within the State and that which is carried on between the States, the contention is that Congress may take full control of the entire industry, the greater power of the nation swallowing up the smaller power of the States.

I might go on and enumerate many other illustrations, but these serve my purpose.

Is there not danger in this tendency, and may we not wisely consider whether it ought not to be stayed? I know it is said that the national government is more efficient than the States, can reach supposed ills in their entirety when the States can only reach them partially. But is efficiency the only test? If it is, then a centralized government with a dictator is the ideal government, for none has such efficiency and thoroughness as a government under the absolute control of a single individual. Is there not danger in this centralization of building up the party machine and the party boss and giving them a power such as has never been dreamed of in this country? How strenuously even now the party whip is swung over the heads of Congressmen and Senators. Take the recent statehood legislation. It is not open to doubt that while the Lower House almost unanimously believed in the admission of Oklahoma and Indian Territory as a single State, the majority was opposed to the present like admission of Arizona and New Mexico, yet the party whip was swung over their heads and a bill passed that House providing for two new States, one composed of Oklahoma and Indian Territory and the other of Arizona and New Mexico, and nothing prevented the accomplishment of that purpose but the opposition of the Senate. We speak of the English government as a monarchy, a government without a written Constitution, and with an omnipotent Parliament, but Canada, Australia and other English colonies have far more freedom of government in local matters than do our States. Look among the Republics of the world, and which one has stood the longest; is today the freest? Who would hesitate to give the first place to Switzerland, and yet the general government there exercises but a very limited control and the different Cantons are Supreme in almost all matters.

The truth is we are charmed and entranced by the thought of the power of the nation. We glory in all that it has accomplished and the position that it is occupying among the nations of the earth, and we think of it as the supreme object of care. To my mind far more important is the protection of the individual, the building up within him of a sense of his personal responsibility. Naturally he will become inattentive and careless when he feels that the responsibility for the affairs of his community is not vested in the inhabitants of that community, but is located in Washington. While I rejoice with all others in the magnificent position of this nation in the sight of the world, I rejoice far more in seeing the individual citizens of the separate communities so

interested in the public welfare that for their communities they are striving to maintain justice and righteousness. For the most glorious product of our civilization is not the entrancing beauty of the capitol, the magnificence, wealth or extravagance of the government, its ironclads, or its army, its wonderful system of railroads, its marvelous manufacturing, mining and other industries, but rather the individual's possession of an independent, conscientious, public-spirited citizenship.

Much is heard these days of the community of interest, the public weal, the general good, the brotherhood of man, the solidarity of nations, etc., but all that is best in these comes from the voluntary action of the individual and not from any compulsion. I glory in the last words of the patriot Nathan Hale, who when led to his execution said: "My only regret is that I have but one life to give for my country." How different would it seem had he said: "I am thankful I have only one life that my country can take from me." Most any man going to the gallows would say that. Few men care to be hung twice. The patriot Arnold Winkelried saw the serried ranks of Austrian spears against which his Swiss comrades struggled in vain. Rushing forward, he caught a number of those spears, and, sinking them in his own bosom, bowed them to the ground. Through the opening in the Austrian phalanx thus made his fellow soldiers rushed in and won victory.

" 'Make way for liberty,' he cried;
Made way for liberty and died."

Joyfully and willingly he gave his own life and in so doing he also gave liberty to Switzerland, and wrote his own name high upon the roll of Liberty's immortals.

Never will we pass the danger line until those who dwell in all our communities realize that upon themselves rests the burden of our civilization. It is human nature to turn responsibilities off if possible, and if you develop in the locality a general feeling that in a government at Washington rests full responsibility, the individual will steadily lose the spirit of independent, public-spirited citizenship. I am not pessimistic. I believe in the glorious future of this Republic, for though I clearly see the tendency today, I as firmly believe that there will yet be a glorious resurrection of that spirit of individuality, that sense of personal responsibility which can alone give to this nation an enduring and brilliant future.

Do not think that I am blind to the terrible wrongs which recent investigations have disclosed to the American people, or question the right and duty of governmental action. That which I wish to

call attention to is that too much and too frequent interference by government blunts the sense of individual responsibility, and the danger is that we drift to a condition where the individual abandons his own duty and simply appeals to government. So that if a man buys a pair of shoes which pinch his feet he will rush to the Legislature for some statute regulating shoemaking, and for fear the State Legislature can not reach every shoemaker in the land, hasten to Washington to have Congress undertake the work of regulation under its power over interstate commerce. The police power, never yet defined, is constantly broadening in its exercise, until it threatens to become an omnivorous governmental mouth swallowing individual rights and immunities. Those guarantees of personal rights which to my mind are the most valuable portions of the Constitution are, if not openly disregarded, at least slurred over. Think of a citizen of the United States being driven into exile by the star chamber action of a ministerial officer without right of judicial inquiry and protection unless it is shown that the ministerial officer has failed to act regularly. Not such is my faith or reading of the lessons of the past. The grandest political document ever penned by the hand of man, our Declaration of Independence, affirms for each one the inalienable right of life, liberty and the pursuit of happiness. John Hampden, the great English patriot, fought alone his legal battle to protect his saxe against illegal taxation, and, while he lost in that battle, he won a glorious victory for enduring Anglo-Saxon liberty. Patrick Henry, in that burst of eloquence which shook alike the northern pine and the southern palm, cried out, "Give me liberty or give me death." It was not liberty of the government, but liberty of the individual which made that declaration immortal. Suppose I paraphrase this declaration a little to adapt it to the supposed demands of modern conditions. "Give any combination of capital liberty to take my business into its hands or to destroy that business if I refuse to surrender it. Give to any organization of labor liberty to enroll me in its membership and furnish me work at prices and places which it fixes, or if I dare to act independently to denounce me as a scab and pursue me with physical violence." Never would that grand old Virginian have permitted his lips to be soiled with such a declaration as that. Rather would he have cried out, "Give me death, for in that there is liberty at least."

Let it never be forgotten that the protection of the liberty of the individual is the great duty of the Republic. Liberty; it is one of the grandest words in the English tongue. My heart responds to the gentle invitation of the Man of Gallilee, "Come unto me all ye

that labor and are heavy laden and I will give you rest." I rejoice in the comforting words, "In my Father's house are many mansions. * * * I will go and prepare a place for you. * * * I will come again and receive you unto myself that where I am there ye may be also," and in the pathetic appeal of his final prayer for his followers on earth, "That they all may be one as thou Father art in me and I in thee." But (and I say it reverently), if the Almighty should come and say to me that I *must* enter the Kingdom of Heaven, there is something in my Anglo-Saxon spirit which would stiffen my spinal column until it was like an iron ramrod and force from my lips the reply, "I won't." In short, I believe in the liberty of the soul subject to no restraint but the law of love, and in the liberty of the individual limited only by the equal rights of his neighbor. Whatever may be the changes of the future, whatever the new conditions of social, business or political life, the time will never come when anything will justify shackling the golden rule or striking down the Declaration of Independence.

A CRITICISM OF THE ORGANIZATION OF THE COURTS AND A THEORY FOR THEIR REORGANIZATION.

A PAPER READ BEFORE THE ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 12, 1906,

BY

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I fear that my subject as phrased is misleading. Certainly I have neither the time nor the facilities for the collection of the necessary data, nor the competency to, in a comprehensive way, deal with so great a subject; nor is this the occasion to attempt anything more than to stir up intelligent criticism and to furnish a basis of discussion of long hoped for but perhaps still distant reforms. I shall not attempt to prove the facts which make reform a necessity, they are known to all lawyers and to almost all men. Nor is it possible to discuss practice, except in some cases as illustrating existing evils. Putting to one side the abstract law and the law of application, in its bearings upon this subject, the discussion will be confined to some of the greatest defects of our judicial machinery, and the suggestion of a plan for its reconstruction; not as the best, which must be found and moulded by more ingenious heads and skillful hands, but an effort merely to induce criticism and thought.

I commence, therefore, with a plea for intelligent criticism. It will be difficult to arouse interest, because, in the nature of things, this reform comes last of all; because a constructive imagination is the rarest of faculties, without which it is impossible to suppose a better way, and because of the despair of lawyers that anything can be done, and that carping fault-finding to which we are all given when we, or our clients, are caught in some slip of the ill-working machine. For the absence of broad-minded criticism of the law itself, the judiciary and the judicial machine, is one of

the characteristics of the American lawyer. He rarely reads books of legal criticism, and our most popular text-writers too much devote their energies to sifting and grading the whole grist of the judicial mill. They get up precedents for the judges and the judges return to them precedents for other books; and so we go on the dull round of book on book, and report on report, manufactured to be used to find precedents and never read or considered as a whole. Which of our jurisconsults has or is attempting to give us an adequate work of comparative criticism, helpful to evolve the law, correct its administration, and reconstruct the judicial machine? The time has come for destructive and reconstructive criticism, not so much of the abstract law as of the law of application, and, above all, of the judicial machine, without the right construction of which theory and practice go astray. We should be preparing the path for the new civilization and the new social organism.

Perhaps we have an overrapid departure from precedents in the groping of the judges for the new ways in which we must soon walk, but the evolution of our jurisprudence is too much unguided by philosophical thought and historical insight. A judge dealing with the limited facts of a given case and bound by precedent, can not do this work except by slow degrees. He can hardly, in a proper sense, be a legal critic and reformer. The United States has produced no Maine nor Bentham nor Austin. They have not even produced a novel-writer to write "A Bleak House" or to ridicule the machinery of the courts with scenes like those in *Pickwick*. It is plain why there is such a poverty of legal criticism in the United States. We are still a new country. The practitioners of the law must live out of the law. There are almost none who attain financial ease, professional success and scholarship during the limited period of our short lives and when working power remains. Besides, we are split into a great number of independent sovereignties. Consequently the collection of data and the study of comparative jurisprudence is, with us, a vast work, for that legal criticism which is limited to the abstract law, and takes no account of the law of application and of the judicial human machine, misses the mark. What a great work would he have who would merely attempt to trace down to our times the evolution of Texas jurisprudence and its machine? To follow the system of community out of the dark forests of Germany of Scandinavia across France into Spain, and then to Mexico; to give an account of the meetings of two civilizations in the wilds of Texas, and the acceptance of this principle of the

equality and partnership of the wife with her husband, so contradictory to the system of dower under which the Anglo-Saxon frontiersmen had grown up, but yet as harmonizing with the Germanic instinct of our race while they generally adhered to the common law. Here, on fresh soil, came into play the forces of the civil and English law, and the peculiarities of the Spanish system. Here the homestead was first, among English-speaking people, established and protected, almost the whole law of the devolution of property changed, by the operation of the principle of community; and here, first, on the very outer edge of American civilization, and long before such a reform was anywhere else attempted, equity and law were combined in one case, to be administered by one judge, and the principles of pleading of both systems preserved, stripped of form and minute technicality. No nobler work could be found, and none worthier of a great historian, than to trace these changes, note their reactions upon the social organism, the character, hopes and fortunes of our people, and then point the way to other reforms, and apply this work of the fathers of Texas to our new needs and new society, and so again bring forth new things out of the old. Who undertakes or proposes to undertake such a work? The practicing lawyer can not. Would that some fit professor in our University could rescue enough time from the duties of the classroom to render this service to Texas!

The principle of the law is always settling down, purifying, and lustrating itself. The theories of justice and logic, often defeated, are yet always, like gravity, at work. The feeblest judge makes a show of following the light. Abstract justice almost always is expressed. But ancient abuses and modern decay stick in the machinery of things. Thousands are interested in organizations, wornout methods and archaic theories of practice and the construction of the machine. No better illustration of the casting of these blocks in the path of reform can be found than the history of the High Court of Chancery of England. At the very time when the noblest of all systems of jurisprudence was being developed into its modern form, that court was sinking under an increasing burden of expense and wrong organization. The theory of equity developed and the administration of justice decayed; the more the one was perfected, the more was the other outraged. The court became a great national scandal, infested by a banditti of placeholders and lawyers, spinning their expensive red tape, and diligently stirring in their dust bins to the clouding of counsel. Bacon, corrupt, and surrounded by corrupting influences, yet at-

tempted to do something. Cromwell saw the evil and possibly would have anticipated the reforms of Victoria's reign, had he not died out of due time. Not very long after his death commenced the labors of Nottingham, Hardwicke and Eldon, and their great associates and successors who moulded equity as we have it today, but it took over two hundred years to get rid of the machine of the Chancery Court of England, and to rout out of it those thieves and oppressors, who, not like Friar Tuck and Robin Hood, took the purses of the rich merchant and abbot and let the poor man go, but robbed along the road to justice and let none pass, and, above all, ground the faces of the poor. It took a generation of indignant men, novel-writers, legal critics and politicians to rouse the nation, direct public opinion, before the temple of justice could be cleaned and organized greed routed. With the most beautiful theory of justice and the best judges, the court remained the dreaded tyrant of a large part of the people. Macaulay has humorously preserved the fact that the sporting men of his day could invent no term of their slang to more strongly describe the unfortunate situation of a prizefighter, whose opponent had caught his head under his arm and was pounding his face into a bloody jelly, than to say that the unfortunate "was in chancery." And what lawyer today has not often seen his clients buy their peace rather than submit just causes to the delay, expense and uncertainty of our judicial machine. Under different forms, we are perilously near the condition of the English Court of Chancery. It is a worn charge that lawyers lend themselves to the promotion of injustice. But the bar can not be better than the bench, and the bench can not be better than its organization. The courts are one of the chief battlefields of blackmailers and the holders-up of transactions. Every day, even with good judges, through the perversion of the machinery of justice itself, the weaker gives way to the stronger, the right to the wrong, and great monopolists seize more of the approaches to opportunity, and more and more destroy that individualism which is the foundation of all our progress; and they themselves, in turn, are surrounded, snipped, bitten into, and tormented by a swarm of sharking plunderers, who find them an easy prey, in the courts, as well as around legislative bodies.

The evolution of correct theories of justice is by no means a proof that the times are progressing. Justinian's Codes were compiled when the courts were in decay, and when the Eastern Empire, rotten to the core, was descending hopelessly into its lingering death. The Christian religion, as a kingdom of principle,

was promulgated in a decadent society and in a nation robbed of its liberties and despairing of its future. Freedom and right principle are perhaps most usually given to the world by men immediately unsuccessful, the price of their sorrows and broken hearts, and handed on for the profit of foreign nations and other times. The practice and organization of things are oftenest too strong for even established principle, but out of principle at last all reform of organization must come.

Evolution had always pursued this course through Church and State. The machine outlasts its usefulness, its errors may have been exposed a hundred years and abandoned of all thinking men; but the machine lasts on, an impediment to all progress, the tyrant of consciences and religions and the bitter opponent of those who are trying to carry forward the torch of civilization into the surrounding darkness. Our judges, as a whole, do not, any more than the great chancellors of England, stand for the perpetuation of wrong organization, and the crushing evils which it inflicts on those least able. But the vast number of small officeholders, a portion of the judiciary itself, and a part of the profession of the law; those whose over-self-valuations make them ambitious for the bench; instinctively have opposed and will always oppose a dead weight to all progress. In addition, it is one of the fundamental weaknesses of human nature that men should regard theory of principle more than action, profession more than fruits; and having reached the fundamental abstractions of things, suppose that they, without hard and conscious effort, will organize themselves into operative forces. And, on the other hand, men are most bigoted for the organization of things, thus perhaps not too extremely illustrated.

Dr. Johnson was one day discussing with a gentleman of position and title his favorite topic, that it made no difference under what forms of legal and governmental machines men lived. Boswell gives us the form of the conversation somewhat as follows:

Dr. Johnson: "People are happy or unhappy according to the way they regulate their lives, government has nothing to do with it."

The gentleman: "Why, then, Doctor, are you at such pains to advocate Tory theories of government?"

Dr. Johnson (making the only possible answer): "Sir, I perceive that you are a fool Whig."

Johnson inserted this almost universal feeling of submission to the machinery of things in these lines in the end of Goldsmith's

"Traveler"; they are recondite and untrue, but state the universal human feeling, which has always opposed liberty and reform.

"In every government where terrors reign,
Where tyrant kings or tyrant laws constrain,
How small of all that human hearts endure,
That part which kings or laws can cause or cure!
Still in ourselves in every place consigned,
Our own best happiness we make or find."

A greater than Johnson, Mr. Calhoun, has said: "That, could we conceive such a thing as a free and progressive people living under a tyrannical or wrongly constructed government, they would either reform the machine of their government or themselves become debased; and that, on the other hand, could we conceive for a debased people an ideally perfect government, either the machine of government would become corrupted or the people elevated to some relation to their government. The perfection of our judicial machine is, therefore, absolutely necessary to our progress in civilization, no matter how great are our professions of principles, or the swinish content of a portion of our people with the comforts and ideals of a too material society."

It has been well said that the best cure for the evils of democracy is more democracy; and I think that this is true, if it means the democracy of the fit, and that kind of democracy towards which we of the South seem to be drifting and which does not proceed upon the idea that every male human being is entitled to vote. But it has been, through all history, one of the weaknesses of democracy to be overjealous of the repositories of its power. This has led to the local election of judges for short terms, and in Texas to the reduction of the judge to a mere umpire, as far as the issues of fact are concerned. Probably there is no greater stronghold, in that State, for the rich and powerful litigant defending an unjust cause than in "laying for" the judge on his charge. Our Democratic jealousy for the rights of the jury and against the power of the judge, has resulted in a queer organization of our courts. The result has worked out that the judge is supposed to deliver an abstract disquisition on the law by any possibility applicable to any phase of the evidence, balancing himself on each delicate point with miraculous accuracy and never referring with emphasis to any part of the evidence. The system supposes that the jury is composed, not of shop-keepers and farmers and mechanics, but of metaphysicians given to the nicest adjustment of phrases and the meaning of words. It is often fatal if the judge

uses ordinary tautology, or, caught by the sound of rolling synonyms, strings words in his charge, written while he sits upon the bench in the hurry of a trial.

The jury is sometimes supposed to understand the meaning of the words in a purer sense, and to be a better master of composition than the judge, and the case will be reversed because the judge is held to have invaded the province of the jury, and by some emphasis to have jeopardized their sacred right to pass upon the facts. Our Reports are full of cases, disentangling sentences, considering errors for the refusal of charges tendered to the judge at the last moment, and with the precision of the grammarian determining the emphasis of words and their meanings. A majority, I think, of Texas lawyers, would agree with me in hesitating to advocate the reform of the machine in this respect, until our judiciary has been extensively reorganized. But the weakness of the courts is to the advantage of the litigant who is in the wrong, and this piece of machinery has produced much delays, expense and injustice.

Perhaps a jealous democracy has most injured the exercise of its own powers and defeated its own purposes by the developed theory of the organization of the State courts generally prevalent over the United States. I may be pardoned for taking my illustrations from Texas conditions. The statement now made is, of course, for non-Texas lawyers and as a basis for criterion. The whole judiciary is elective, and for very short terms. Justice is scattered out so as to be in the reach of all classes. That is the theory. We have a complicated hierarchy. Justice Courts, with, for the poor man, a considerable jurisdiction; County Courts and District Courts, the county judge keeping a different docket as a probate judge. There are five intermediate courts for correction of civil cases in different sections of the State, and over these presides the Supreme Court, to give a final scrutiny and correct errors which may have slipped by. Then we have a separate court of correction, having only jurisdiction of criminal appeals. We will commence from the bottom a brief scrutiny of this system.

While the county and district judges have some slight powers beyond that of umpire, the justice of the peace has, in theory, hardly any. He is not permitted to deliver a written disquisition to the jury upon legal abstractions. But the actual organization of his court rests with him and the constable, and there is no limit to the powers for oppression which a bad man may exercise over the helpless, and, most dangerous of all, the justice is paid by costs. Fortunately, the justices are, for the most part,

I think, well-meaning men. But dealing with the helpless, such courts should be composed of the most intelligent of citizens, the leaders in their respective communities, the sedate old counselors which every countryside produces, and, in the cities, stipendiary magistrates, high-class and humane men. It is a shame to our civilization that we have no compulsory system of arbitration, at least as a condition of litigation, applying to these small suits.

Our county judge is also the head of the county executive, and the most important of our local officers. He need not be a lawyer, but usually has a license. His duties require extraordinary executive abilities in the administration of county finances and business, and he is, in addition, often the superintendent of the schools. He holds a trial court of considerable civil and criminal jurisdiction, and, comically enough, his court is the Supreme Court to the justices of the peace, for to it numbers of appeals lie, either to be finally determined, or go on their weary way further up. Is not the arrangement a perfect farrago of nonsense, that a case of barely over \$100 may be started in the Justice Court, be tried there a number of times, thence go to the County Court and be tried there again more than once, and thence, sunk in a large and expensive transcript and huge costs, progress into some Court of Civil Appeals, perhaps to be reversed to the County Court, and commence all over again. By such a machine the mean-spirited man, with a pettifogger's aid, can compel the settlement, on an inequitable basis, of almost any small claim. It is an evolution and a bad one. No one mind could have struck off such an engine of oppression, and which the character of our people alone prevents from becoming unbearable. But sometimes these controversies degenerate into fierce fights over who shall pay the costs, and the original subject of litigation, by comparison, sinks out of sight. This is not unknown to be the result of some jackass or cow case in the country, or debt on account in the city; though the city man, with more discretion and less valor than his country brother, is apt to first abandon the fight. He is not usually a Dandie Dinmount, fighting for costs, victory and glory alone, or like the Miller on the Floss, who brought his lawsuits to indulge his sporting blood, and looked upon his lawyer as his cock fighting in the pit, with the tricks of the attorneys as the sole rules of the game. The county judge also holds a Probate Court and acts as probate judge for the whole county. He is a remarkable man who can combine talents adequate to the performance of all of the functions, who is a good executive, a good financier, a good superintendent of public schools, a good business man, a good

accountant, a good lawyer, a good judge, a wise administrator of the estates of the decedents and a faithful protector of the orphans of his county, all at once. How can such a man, if he exists, succeed often in winning a popular election? It is wonderful that so many worthy and capable men are elected, and it is a demonstration of the fitness of our people for self-government that we do, in some way, get on. But who is not cognizant of the miscarriages of justice, the oppression, the unjust and forced settlements which this system brings about? Necessarily, under such system, the probate business is perfunctorily gone through with, large accounts passed with slight examination, and too little time remains to devote to the policy of the administration of estates and the affairs of orphans. It is to the credit of the county judges of Texas that there are comparatively few scandals in probate matters. But estates and orphans undoubtedly suffer from enforced neglect. The vast bulk of the probate business is put through by the lawyers without any effectual judicial scrutiny, and it is due to the bar that orphans and estates are not more plundered. Probably, in more cases than are known, they are. The almost sole protection is the honesty of the lawyers and not the machinery of the courts.

But I now approach even graver subjects. The organization and machinery of these smaller courts, and of the District Courts, has brought about a lack of dignity and rigidity. The canker of perjury does not, I think, grow less. What is there to frighten the ordinary perjurer in one of our courts? We have all had experiences like these: The witness enters, perhaps most often, an ill-kept courtroom, sometimes a little better in appearance than the dives he frequents, and commences to feel at home. He takes the stand and is probably asked one question, met by an immediate objection. Then, as the judge has or may have overruled all the demurrers on both sides, thinking that he will get light as the trial progresses, or that the lawyers are trying to trap him on fictitious issues, and that he can control the issue in his charge to the jury, and as each side has a small volume of pleading, and the whole case is as large before the jury as the lawyers have seen fit to make it, the war breaks out. The judge is often unwilling to appear abrupt; the points in the case or those of evidence are discussed at great length. Law books are hurriedly sent for, the judge perhaps descends from the bench and mingles in a friendly way with the lawyers and litigants, and, after a great argument, His Honor rules, and another question is asked, very likely producing another fight, and fully informing the witness

of the pitfalls ahead of him. He has ample time to prepare, grows thoroughly at home, and often in the bottom of his heart has a contempt for the whole business. When it comes to cross-examination, he may be helped over the rough places by timely objections of counsel, which even contain sly suggestions to him of what he can safely say. As to his oath, it has probably been mumbled to him with a battalion of other witnesses holding up their hands, and he will, as like as not, say to himself that he never swore and that he is guilty of only ordinary prevarications. The art of quick and rapid examination of witnesses is being lost, and, above all, that of pointed and effective cross-examination. Cross-examinations have grown interminable, and instances arise where counsel have examined and cross-examined to the end of the term to insure a mistrial. With the aid of stenographers and typewriters, such a system is becoming unbearable to our courts of review, and records ever bulkier and bulkier. I think that since I came to the bar I have noticed that careful preparation, on the law, the art of examination of witnesses and good speaking have lost something of their relevant importance, while the importance of what may be called the strategy of trials has much increased.

That our judges should lose anything of their dignity, their just powers and the respect due them, as men apart, is the saddest part of it all. Perhaps, human nature being what it is, a certain simple and dignified ritual in the courts, and costume for the judges, such as is coming back into the Eastern States, would be useful. And not only in our courts, but outside, the local election of our judges and the method of organization of their courts is having a most baleful effect. This is no criticism of our judges, who do wonderfully well with such a system. Many of them are able as well as high-minded men, worthy of any bench, but it is almost impossible for them to fail to feel the currents of local affairs and politics. Human nature can not stand the prejudices and influences which are silently at work. Mainly the work is done, unconsciously to the judge, by a sort of hypnotism, and an electric atmospheric condition which penetrates his mind, when there is no jury, and sways him in the exercise of his umpire functions when there is one. The law wisely prohibits the best of men from sitting in cases where their close kin are involved. But friendship, political and social obligations are often more powerful than blood ties, and how can any judge escape these when he spends his whole life in one community, where he exercises his office, and the very place where, say every four years, he is compelled to descend more or less into the political arena?

Again I say that it is remarkable that we do so well under such a machine. Every lawyer, I think, desires to respect the judges; but how much is his respect for them, and even for himself, injured by emergencies which he is compelled to meet in order to protect the interests, the best he can, in his charge? He seldom or never inquires into the honesty of the judge, who is a stranger, and before whom he had to try a case away from home. We have not descended that low. But he feels obliged, where he is not informed, to, as delicately as possible, inquire into the judge's peculiarities of trial, his relations with lawyers, and whether or not his opponent has the ear of the court. Such inquiries may be made about a perfectly upright and honest man, though unfitted for his position by character and learning, but more generally fitted for any fair system and struggling under an organization exceeding the power of human nature. It may be objected to these criticisms that they apply to practice and not to organization, that our practice is defective and that remedial acts of the Legislature will cure much here complained of. But our practice, in theory at least, is far nearer perfect than our organization. The practice over the State of Texas is theoretically uniform, but the habit of practice is different before different judges and in different districts. With one man holding one court, in one district or at one place, always, how can it be otherwise that these unfortunate peculiarities of courts should not develop? One judge may try a case and make a vast bulk of it, and a mess at the end; and by some fortunate luck of transfer it may come up before a more capable man, who severely rules the demurrers, trims out the deadwood, formulates the issues, enforces the rules of evidence and relevancy and rigidly throws out irrelevant matters, and tries the case well on a little record. But I can not take up the minutiae of this subject, the vast cost of fixed terms of courts and adjournments, of waiting witnesses for cases which are never reached, of preparation for trial, and reparation time after time, for cases which are repeatedly set down, but continued or go over by operation of law. All along the line the whole organization is unbusiness like, adapted to delay justice, defer hope and burden the taxpayer and the litigant.

As to the organization of our higher courts, I will here say nothing, a little later on propounding a theory for their reconstruction, noting a few matters in their organization which may be the subject of just criticism. We are all agreed, I think, that the weakest point of organization is in the trial courts, and not in those for review. A theory for the reconstruction of the courts

adapted to our people and principles is a difficult matter. What is now offered is hardly made as a suggestion, but is a mere effort to show that there is no finality in our present system, and that it is easy to imagine one which may be better than what we have.

I will commence again at the bottom, disregarding constitutional restrictions, since no sweeping reform could be made without the adoption of new judiciary articles in our State Constitutions. Our bar associations can do nothing except plant a little seed, and, I for one, have no plan for such a State as Texas which I can state. The subject of this address overstates anything which I feel myself equal to attempting. Simplicity and the elimination of unnecessary expense and officeholders should be our principal guides. Here is a sketch, in no way to be called a plan: Justice and County Courts would be abolished, and all of the business now in them thrown, in the first instance, before arbitrators. This arbitration being enforced as a condition of litigation, would not be binding, if either party objected to the result, nor to be mentioned on a regular trial in the courts. There would be no citation, no judgment book, no records, and perhaps no compulsory attendance of witnesses. Without any of these a multitude of cases are now settled, especially in rural neighborhoods. When complaint was made to the clerk of the District Court he would issue a subpoena and summon the defendant before him, and if the parties refused to appoint arbitrators, then he could appoint them himself. A place and time would be appointed, and the matter heard without delay. If the parties refused to abide the arbitration, that fact merely would be certified to the clerk, and litigation could proceed. If they did abide the result, then the arbitrators would make their return of findings to the clerk, who would formulate them into a judgment, enter it on the minutes of the District Court, and enforce it as a judgment of that court.

The saving that would thus be operated would be incalculable, for few would have the hardihood to reject the result of this kind of arbitration when fair and supported by public opinion. This system prevails in some form, I believe, in enlightened countries. As things are, there are many countryside disputes settled, and justly settled, by submission to calm old men who have the respect of their neighborhoods, and in most cases countrymen, where this useful custom prevails, look upon a man as disgraced who refuses to abide such decisions. The custom is recognized as a common-law arbitration, and though the courts are rarely called upon to enforce awards, an examination of the cases will show that they are almost always upheld. This existing rule of law demonstrates the practica-

bility of the scheme, and is far more radical than what is proposed. All process for extraordinary writs, such as sequestrations and attachments, might issue as now and on the same terms, but by the clerk of the District Court. He would also issue all executions and every writ. We would thus be rid of the intolerable confusion which now prevails through the badly kept books of the multitude of our little courts, often confusing land titles and a fruitful source of litigation. The Probate Court would consist of some competent office lawyer, where one could be found, of character and standing, whose experience and qualifications should be carefully prescribed. His court should, for the most of the time, be open, when there was business to be done, and he should have no fixed terms. The clerk of the District Court would keep his minutes.

Then there should be one other court, the District Court, into which the whole mass of the criminal and civil litigation would fall, except that of the criminal police stipendiary magistrates, and examining officers. This court should be so manned, equipped and held that the smallest as well as the greatest case, the poor as well as the rich, would have the consideration of the strongest judges, and we would then be quit of the idea, which has become fixed with us, that the small case must have a small judge and the poor litigant often a poor and ignorant judge. Of course, there would be the difficulty of large dockets, but the one court might have many judges, according to the necessities of the case, and they might, as the English judges did, in the the same courthouse, be constantly trying, and at the same time, different cases. Were the cases all on one docket, and several judges present, by shifts and arrangements, the sittings could be more nearly kept up with, and all the judges steadily employed; and we would not have the not unusual spectacle of several courts in the same building, some up with the dockets, and the one judge gone fishing, and his brother across the hall hard at work. The judges should be elected, I think, over a wide section, the State being divided into districts, in each of which there would be eleven or fifteen judges, as might be required. There would be no terms of court fixed by law; that impediment to justice, and a cause of the immense waste of time, should be done away with. But the judges should be required to discharge their dockets with the utmost rapidity, and a quorum of them to meet once a month to set terms, upon the inspection of statements of their dockets to be sent to them from every county. The clerks should then notify the lawyers and litigants. The judges of the district could thus apportion the work, set the terms

and hold as many or few as the dockets might require, and as often, as many judges going to one court as were needed. There would then be no special terms, or cases lingering on the docket because the terms were too short to try them. Nor would we have some judges with little to do and others overworked, and all receiving the same pay. The law would provide that no judge would sit twice in the same court in succession, unless in cases of great emergency. This would break up the practice of judge leading and nursing the court, still sometimes heard of in our imperfect State. Besides, a weak judge would not be a standing incubus on any community, the despair of the local bar; he would be stirred by emulation and the comparison which he would feel the lawyers would be making to his disadvantage. He could hardly shake enough hands over many counties to keep in, when the whole bar would be against him. There would be a general circulation of ideas and a fixing of good standards of habits of practice, and the silent competition would tend to push the judges to higher standards. Where dockets were behind, any number of judges could come and clear them off, and in complicated cases sit two or three together, where business permitted.

As to intermediate courts of review in civil cases, I do not undertake to say that it is practical to abolish them. But experience seems to prove that it is not well for one court to find the facts and law and the other—too much like mathematicians dealing with an abstract problem—to find the law only. Their Honors of the intermediate courts could be elevated to the enlarged Supreme Court, or go on the district bench at much greater salaries than they receive, if it is practicable to abolish those courts. The criminal Court of Appeals would remain as it was, but the Supreme Court would be enlarged, sitting in committees when necessary to sift the facts, but together to formulate the law. Appeals would be abolished and a case would be brought up on printed applications for writ of error in which there would be a careful statement of the results only of the evidence, and on trials before the court, the conclusions of facts alone. Controverted facts would be settled by the findings of the jury or of the trial judges, and if not supported in the evidence, then the fact that they were not so supported would be merely stated and this statement would be taken for granted as true in considering the application. The defendant in error should have a copy of the application, and be permitted to file an opposing legal argument, and to state what matters of fact in his opponent's statement he denied. These applications might be argued orally if the court saw fit. If the court were deceived into granting a

writ of error, then it would have power to inflict a fine upon the deceiving applicant. This would be some check for willful and outrageous abuse of the writ of the court, but, of course, no complete remedy.

Copies of the pleadings and the judgments and ruling of the trial court would accompany the application, with arguments and authorities. If the writ of error were granted, then, and then only, would the record and statement of facts be transcribed or printed, and this expense, unnecessary in a multitude of cases going off on the law, saved. Rules for the scrupulous composition of applications and briefs should be reformulated and rigorously enforced. Under such a system, so much time of the judges would not be taken up in the fingering of records, and, besides, difficult cases would usually have been tried before two or more judges, and there would not be so many errors to correct. The number of jury trials would immensely decrease.

No courts would sit during the heat of the summer, and the Supreme Court, the Court of Criminal Appeals, and the intermediate courts, if there were any, would all adjourn for at least one month during the winter, and all of the judges composing them go on circuit, and sit with the district judges. During this month, scattered out over the State, they would sit in the trials of cases, give standards of dignity, and preserve uniformity of customs and habits of practice throughout the State. They would naturally, as the records come before them, uphold the principle of keeping down bulky records, cut down windy examinations and cross-examination of witnesses, and inspire the bar to better taste and manners, both in the trial and the argument of cases. As heads of the judiciary they would thus have a yearly review of the progress of the courts, be the best custodians of the traditions of the bar, enforce its standards and increase respect. In all of this there is, of course, nothing new, but a reversion to the better English custom, still in force, in theory, in the Federal courts. While perhaps impracticable for so large a country as the United States as a whole, this arrangement would be entirely practical, for a State, on a right organization of the courts. All of our judges should be better paid, and should have all their expenses allowed.

I can not speak for other States, but that the present system can not, without repair, remain much longer usefully in operation in Texas, seems certain. My impression is that in most States the same difficulties exist. It seems impossible that three Supreme judges should be able to review all of the important litigation of a State like Texas. The success of our Supreme Court is only ex-

plainable by the exceptional abilities and experience of its members. But, necessarily, writs of error are refused which should be granted, and cases are ruled and overruled, but far more often distinguished, or passed over and not mentioned at all. This is inevitable, for no human minds can so rapidly take a view of so many legal human problems, master their details, and render judgments, without falling into error, sometimes and oftener than should be the case. In saying this, we make no criticism of the Supreme Court. The abilities of the judges alone support and make at all workable such an organization.

Our people are ripe for reform; they sadly need guidance. They are by no means as impervious to enlightened methods, nor as much swayed by demagogical ideas, as pessimists and interested opponents of reform would have us believe. I am by no means sure that a wise and sweeping reform would not now be welcomed, if boldly advocated. A few years ago the Constitutional Convention of Virginia abolished a large portion of the smaller courts of that State, and I have not heard any complaint. But a system must be possible, giving the poor better and more certain justice, decreasing the expenses of the courts and the number of judges, requiring all to do a reasonable amount of work; and not as now, some to be overworked and others permitted to drag through slow courts for a part of the year only; increasing their salaries, the length of their terms and the dignity of their offices, and no longer shutting them up in localities of small areas.

BILLS OF LADING AS COLLATERAL FOR LOANS.

A PAPER READ BEFORE THE

ARKANSAS AND TEXAS BAR ASSOCIATIONS

JULY 12, 1906.

BY

MR. W. B. SMITH,
OF LITTLE ROCK, ARKANSAS.

In considering the question of the character of security acquired by a bank in bills of lading assigned to it as collateral for advances made, we will consider first the protection given bona fide holders of bills of lading, other than the original parties to the contract, by the statutes of this State.

The chief features of the Act of the General Assembly of this State of March 15, 1887, entitled "An Act to Regulate the Duties of Warehousemen, Transportation Companies and Others," as applied to bills of lading are:

First. The master, owner or agent of any boat or vessel of any description, the forwarder or officer or agent of any railroad, transfer or transportation company, are prohibited from signing or issuing any bill of lading for any merchandise or property, by which "it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped or put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading."

Second. Bills of lading issued by any boat, railroad, transportation or transfer company for goods, wares, merchandise, cotton, grain, flour or other produce or commodity, are made "negotiable by written endorsement thereon and delivery in the same manner as bills of exchange and promissory notes."

Third. Such bills of lading given by any carrier, boat, vessel, railroad, transportation or transfer company "may be transferred by endorsement in writing thereon and the delivery thereof so endorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof."

Fourth. The carrier, boat, vessel, railroad, transportation or transfer company issuing a bill of lading for such property is prohibited from delivering the same "except on surrender and cancellation" of such bill of lading.

Fifth. Any carrier, boat, vessel, railroad, transportation or transfer company, or any person who shall violate any of the above provisions, or any of the provisions of the Act, the substance of which I have not set out, "shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding \$5000, or imprisoned in the penitentiary of this State not exceeding five years, or both." And the criminal offense is made to apply to the agents and servants of the persons or corporations violating the provisions of the Act as well as to the persons and corporations themselves.

Sixth. For any violation of the provisions of the Act all and every person or persons aggrieved thereby may have and maintain an action at law against the person, corporation or corporations violating said provisions for all damages which he or they may have sustained by reason of such violation, before any court of competent jurisdiction, whether such person or corporation so violating the provisions of the Act have been convicted of fraud under the Act or not.

Our Supreme Court, in the case of *Martin vs. Railway Company*, 55 Ark., 524, being the first case in which this Act was considered, defined the general scope and purpose of the Act as one for the protection of bona fide holders of the receipts of warehousemen and bills of lading of carriers, saying "that the main object of the Act is to fix the liability of warehousemen, common carriers and other persons named in the Act to the holders of their receipts or bills of lading."

NEGOTIABILITY.

A bill of lading, while it has the twofold character of a receipt and contract, being a receipt so far as it recites the property delivered to the carrier for shipment and the nature and condition there-

of, is essentially a contract between the shipper and the carrier for the carriage of the property covered by it, upon the conditions and terms therein stipulated as modified by the statute or qualified by the common law, for the order of the shipper or the consignee named, or his order. At common law it is also a symbol of the property which it recites the carrier accepted for shipment, and is a muniment of title. Such a contract at common law is not assignable so as to vest in the assignee the right to sue on it in his own name. Although it is an order bill of lading, it does not, like bills of exchange and promissory notes, fall within the exceptions established by the law merchant that they pass absolutely to the endorsee by written assignment and delivery, or to bearer by delivery alone if endorsed in blank, as bills of lading are not intended to perform the same functions in the commercial world as bills and notes. While at common law the legal title to the property represented by a bill of lading did not pass by the assignment and delivery of the bill of lading, nevertheless the assignment and delivery of it had the effect to vest the assignee with the equitable title in the property; and the delivery of the bill of lading by the owner to a third person without any written assignment or endorsement, as security for advances made, gave such third person an equitable lien or title in and to the property represented thereby to the extent of the advances made, but it did not afford him a right of action in his own name. This is true notwithstanding the fact that the above statute makes them negotiable only by written endorsement thereon and delivery. The delivery with the written endorsement carries the legal title, but a transfer without endorsement as security for advances made is sufficient to pass the equitable title in the property represented thereby, as held in the case of *Turner vs. Israel*, 64 Ark. 244.

This brings us to a consideration of the meaning of the language in the above Act, "shall be and are hereby made negotiable by written endorsement thereon, and delivery in the same manner as bills of exchange and promissory notes." The meaning and effect of similar language in the statutes of Missouri and Pennsylvania were passed upon by the Supreme Court of the United States in the case of *Shaw vs. Railroad Company*, 101 U. S., 562. Like our statute, both the statutes of Missouri and Pennsylvania prescribe the manner of negotiation, that is, by endorsement and delivery, but neither undertake to define the effect of such a transfer. The court in passing upon that question said:

"We must, therefore, look outside the statute to learn what they mean by declaring such instruments negotiable. What is ne-

gotiability? It is a technical term derived from the usage of merchants and bankers in transferring primarily bills of exchange and afterwards promissory notes. At common law no contract was assignable so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes payable to order or bearer have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by endorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and *the capability of being thus transferred so as to give to the endorsee a right to sue on the contract in his own name is what constitutes negotiability.* The term 'negotiable' expresses at least primarily this mode and effect of a transfer."

It does not follow, because the form of negotiation as expressed by the statute and the right of the endorsee to sue in his own name are the same as in the case of bills of exchange and promissory notes, that all of the incidents which attach to bills and notes and which have grown out of the usage of trade and become the established rules of the law merchant, attach to or inhere in bills of lading, which are transferred under the terms of the statute by written endorsement and delivery. The difference in the rules governing the two characters of instruments grows out of the different functions they are intended to perform. Bills of exchange are the representatives of money in a very high sense, and are used in the business transactions of the commercial world and pass from hand to hand the same as bank notes, and both bills of exchange and promissory notes are used in the payment of debts. A bill of lading is a symbol of the ownership of the property which the carrier issuing it recites he has received for transportation. An innocent purchaser for value of property stolen can not hold the same as against the true owner, and acquires no title therein as against him. So in the case of the symbol of the property, the bill of lading. No greater right can be acquired by a purchaser of a stolen bill of lading as against the person from whom it was stolen than he could acquire if he had purchased the property, unless the true owner has been guilty of such negligence as to estop him from asserting a claim to the bill of lading as against the innocent purchaser. In such a case the question of whether the true owner was guilty of negligence was submitted to the jury in the trial court in the Shaw case, and the Supreme Court of the United States approved the submission. If a bill of exchange, or note payable to order, is endorsed in blank so as to be negotiable by delivery alone, and after such endorsement is lost or stolen, the bona fide purchaser for value before maturity

acquires title to it even as against the true owner. Such purchaser may hold the bill or note against the true owner although he took it negligently and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the bill or note is not the property of the person who offers it for sale will defeat the right of such purchaser. There are certain other incidents attached to bills and notes, such as the liability of endorsers after due demand of payment is made of the maker or acceptor and notice of non-payment is given the endorsers, and the necessity of demand of payment at maturity in order to hold endorsers, which are inapplicable to bills of lading. The maker or acceptor can not set up against a bona fide holder of a bill or note for value before maturity any defense which might have been set up against the payee had the title to the bill or note remained with him, but the transfer of a bill of lading does not cut off an investigation into the origin of it, or vest in the transferee a title free from any equities as against the transferrer, except as a bona fide holder is protected under the terms of a statute which is passed for the purpose of preventing the carrier which issues the bill of lading from denying the receipt of the goods covered thereby as against a transferee for value. The above distinctions are sufficient to illustrate the fact that the language of the Act making bills of lading negotiable in the same manner as bills of exchange and promissory notes, was not intended to attach to bills of lading all the incidents of negotiability of bills and notes. The court in the Shaw case, after noticing the distinctions, concludes in this language:

"It can not be, therefore, that the statute which made them negotiable by endorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of endorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or of the loss of the owner's property by the fraudulent assignment of a thief. If this were intended, surely the statute would have said something more than merely making them negotiable by endorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Es-

pecially is so great an innovation as would be placing bills of lading upon the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it."

RIGHTS OF TRANSFERREES OF BILLS OF LADING.

The Act of 1887 provides, as hereinbefore set out, that bills of lading "may be transferred by endorsement in writing thereon, and the delivery thereof so endorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof." The purchaser or pledgee of the bill of lading, upon the delivery of it to him properly endorsed, acquires the title to the property covered by the bill of lading as fully and completely as if the possession of the property itself was transferred to him, and he may in his own name sue and recover the possession of the property, or, if it has been converted, the value thereof, from the person holding the possession or who was guilty of the conversion. He may, if the property has been stolen, pursue and recover the specific property, his bill of lading being used as evidence of his title, and he acquires all the rights against the carrier which the original owner of the bill of lading had, free from any equities which the carrier may have had against the original owner. (The provisions of the Act under consideration, prohibiting the carrier from issuing a bill of lading for property until the property is actually received, and from delivering the property except upon surrender and cancellation of the bill of lading, afford him such protection against equities between the carrier and transferrer.) The use of the language, "as on the faith thereof," gives rise to a doubt as to the absoluteness of the title acquired by the endorsee, if he has notice of the fact that the transferrer holds the property merely as an agent or factor and not as the owner. The language, "as on the faith thereof," was originally used in Factors' Acts. A review of the provisions of these Acts is made by the Supreme Court of the United States in the case of *Allen vs. St. Louis Bank*, 120 U. S., 20. It appears from the review thereof in this case that the English Factor's Act of 6 George IV, Chap. 94, passed in 1825, enacted in Section 2 that any person entrusted with and in possession of any bill of lading, warehouse receipt or other like document, should be deemed and taken to be the true owner of the goods described therein so far as to give validity to any contract made by

him with other persons for the sale or disposition of the goods, or for the deposit or pledge thereof as a security for advances made by them "upon the faith of such several documents or either of them"; *provided such persons had no notice, by such documents or otherwise, that the person entrusted as aforesaid was not the actual and bona fide owner of the goods.* The New York Factor's Act of 1830, which was based upon the Act of 6 George IV, provided that "every factor or other agent intrusted with the possession of any bill of lading," etc., should be deemed to be the true owner thereof so far as to give validity to any contract made by him with any other person for sale or disposition of the merchandise or for any advances made by such other person "upon the faith thereof." The proviso in the English Factor's Act was not repeated in the New York Factor's Act, but under the decisions of the State of New York interpreting the Act it was held that the words "on the faith thereof" were to be referred to the words, "shall be deemed to be the true owner thereof," and the court, in the case of *Stevens vs. Wilson*, 6 Hill, 514, says: "The obvious meaning is, that the factor or other agent who has been intrusted with certain documentary evidence of title or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him 'upon the faith thereof'; that is, upon the faith, induced by the usual indicia of title, that he was the true owner of the property."

It is further said in that case that the New York Act, although it did not contain the proviso in the English Factor's Act, was evidently designed to produce the same results, and the court then says: "It is impossible to suppose that the Legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee, or person making the advances, knew he was not dealing with the true owner."

The difficulty that arises is that the Legislature of this State inserted into the above Act relating to the negotiability of warehouse receipts and bills of lading the words "on the faith thereof," which had formerly been used only in the Factors' Acts. The Legislature of the State of Missouri in 1868 and 1869 passed acts relating to the negotiability of warehouse receipts and bills of lading similar to our statute under consideration, and in that act inserted the language "on the faith thereof." The Supreme Court of the United States in the *Allen* case, *supra*, review this statute of the State of Missouri, and express the opinion without deciding the question, as it did not consider that point necessary to a determina-

tion of the case, that the statute was intended to protect only bona fide endorsees. It is well known that a factor or agent for sale has no power to pledge the property that has come into his possession, or the symbol of the property. In view of the limited interest of a factor in the property intrusted to him for sale, it would not be safe, in my opinion, for a bank to advance money upon bills of lading of such a factor for cotton consigned to him, if the bank has notice or knowledge of the character of the business of the factor. The bank would be subrogated to all of the rights of the factor to the extent of advances made by the factor to his principal, and to that extent only would be safe in making the advances. But if the bank dealing with an agent or factor has no notice or knowledge that he holds the bills of lading as agent or factor, but advances him money on the same on the faith that he is the true owner thereof, then the bank's security would not fall within the exception and it could be enforced as against the claim of the principal of the factor or agent.

LIABILITY OF CARRIER FOR DELIVERY OF PROPERTY WITHOUT RE-
QUIRING SURRENDER AND CANCELLATION
OF THE BILL OF LADING.

At common law the carrier is bound to keep and transport the goods consigned safely and to make right delivery. In the case of North Pennsylvania Railroad Company vs. Commercial Bank, 123 U. S., 733, the court says: "The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment or to his order at the place of destination."

In the same case it is said: "If the consignee is absent from the place of destination, or can not, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person, to be kept on account of and at the expense of the consignee. He can not release himself from responsibility by abandoning the goods, or turning them over to one not entitled to receive them."

This decision followed the decision in the case of *The Thames*, 14 Wall., 98, in which the court laid down the rule: "It is no excuse for a delivery to wrong persons that the endorsee of the bill of lading was unknown, if indeed he was, and that the notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee at least was the duty. Want of notice is no excuse when the consignee is unknown or is absent or can not be found

after diligent search, and if after inquiry the consignee, or the endorsee of the bill of lading for delivery to order, can not be found, the duty of the carrier is to retain the goods until they are claimed or to store them prudently for and on account of their owner."

The Supreme Court of Arkansas in the case of *Railway Company vs. Neville*, 60 Ark., 375, and a number of other decisions has adopted the same rule. It is not held in any of these cases that the carrier may not deliver without requiring a surrender and cancellation of the bill of lading. The effect of the decisions is that the duty of the carrier is to make right delivery, and it can not excuse itself from liability because of the failure of the consignee or the endorsee of the shipper, if a shipper's order bill of lading is taken, to appear and claim the goods, but in such event it must store the goods at the expense of the consignee or endorsee of the shipper, and its liability from that time would be that of a warehouseman instead of a carrier.

A carrier issuing a shipper's order bill of lading knows that it is taken to order so as to enable the shipper to retain the *jus disponendi* of the goods shipped and that the title of the property will probably pass to a third person, either as absolute owner, or as having a special interest as a pledgee, by the assignment and delivery of the bill of lading. The common law recognizing this purpose of a shipper's order bill of lading, made the carrier liable if it delivered the shipment to a person other than the person holding the bill of lading. The carrier was not required, however, to take up the bill of lading and cancel it, and because it was not so required a class of cases has arisen where shipper's order bills of lading have been transferred to innocent third parties after the shipment has been accomplished. The Act of 1887 and similar Acts passed by other States prohibiting the carrier from delivering the property except upon a surrender and cancellation of the bill of lading, was designed to make effectual the bill of lading in the hands of a third person, who received it in the ordinary course of business. It is only by a provision prohibiting the carrier from delivering the property covered by the bill of lading except upon surrender and cancellation thereof, that third persons could be protected against spent bills of lading, that is, bills of lading representing goods the shipment of which has been accomplished by the delivery thereof. The Factor's Act of New York contains a similar provision to the Act under consideration of this State with reference to the delivery of the goods, and prohibits the carrier from delivering the goods except upon the production and cancellation of the bills of lading. In the case of *Colgate vs. Pennsylvania Com-*

pany, 102 N. Y., 120, bills of lading were issued by initial carriers at Memphis, Tennessee, and Little Rock, Arkansas, for oil to be delivered at the city of New York to J. F. O'Shaughnessy, and bills of lading to that effect were made and delivered upon the receipt of the oil. (These bills of lading were transferred to plaintiffs by delivery for money advanced by them to the consignee of the oil.) Before notice was given to the defendant Railroad Company of the transfer of the bill of lading, or any demand was made for the oil, it was, under the authority and direction of O'Shaughnessy, the consignee, delivered for him to the Hudson Oil Works in South Brooklyn. The plaintiffs, the transferees of the bills of lading, afterwards demanded the oil from the defendant upon their bills of lading, and as no delivery could then be made they brought suit against the defendant for conversion. The bill of lading here was a straight bill of lading, but was transferred by the consignee, who clearly had the right to assign it, by endorsement in writing and delivery, as no distinction is made in the statute making bills of lading negotiable between straight and shipper's order bills of lading. The court in passing upon the case does not determine whether before the statute the difference in bills of lading between those drawn "to order" and those billed "straight" to the consignee alone created any difference in the duty and right of the carrier with respect to delivery, as the court did not think the question an important one, since they considered that the provision of the statute as to surrender and cancellation of the bills of lading upon delivery was decisive. The court says: "The statute forbids a delivery except upon a production and cancellation of the bills of lading, and interpolates into every instrument that imperative condition, and makes such condition an element of the contract as perfectly as if therein written. It gave to the bills of lading under which the oil was carried, this construction: that the carrier should deliver to the consignee provided he produced and canceled the bills of lading. The primary object of the statute was to insure delivery to the party actually entitled, and close the door upon opportunities for fraud resulting from delivery in ignorance of the true ownership. * * * The consignee had parted with the bills of lading and his consequent right to the property, and the delivery to him was to one not the owner and having no right to receive it."

It was urged in this case that the Act aimed only to protect against "spent bills" or such as existed after delivery, and so are susceptible of a fraudulent or wrongful use. The court in that connection says: "Doubtless the last was one of the evils sought to be prevented, but that purpose can only be effectually accomplished

by forbidding delivery except accompanied by cancellation of the bill. By no other mode could the existence of 'spent bills' in a form capable of deception be prevented, for if the carrier could deliver to the consignee without cancellation, the bill of lading would be left outstanding as a possible basis of fraud. The statute, therefore, does prohibit the delivery except on the prescribed condition. * * * The business convenience of a safe and easy transfer of bills of lading, and the danger of leaving the title they represent at the mercy of the consignee, unless notice be given to the possibly unknown final carrier, and the importance of making the title they give secure for the purposes specified, were all subjects within the purview of the enactment, and the statute is too wise in its provisions and too beneficent in its aim to be narrowed or weakened by any needless criticism."

The question frequently presents itself to banks in dealing with this class of securities whether a straight bill of lading may be transferred to the bank as collateral security for loans and afford it security equally within the protection of the statute, that is afforded by a shipper's order bill of lading. The answer to the question is that at common law a bill of lading, whether a straight bill of lading or issued to shipper's order, was a contract that was assignable, and by assignment invested the assignee with the equitable title in the property covered by the bill of lading, and the statute of this State and such statutes of other States as I have examined, in declaring bills of lading to be negotiable by endorsement in writing and delivery do not make a distinction between shipper's order and straight bills of lading. The only difference between shipper's order and straight bills of lading is that in the former the *jus disponendi* of the property is retained in the shipper and it is through him or his assignee that the title may be transferred and the security given; in the latter the title passes at once to the consignee upon the delivery of the goods to the carrier, and the security upon that bill of lading can only be made available by the indorsement and delivery by the consignee or his assigns. Under the statute of this State it is not necessary that the holder of the bill of lading, whether he is the holder of a shipper's order or straight bill of lading assigned to him, should give notice to the carrier that the title of the property has passed to him. The statute protects him against a wrongful delivery, and the carrier must, at his peril, make a right delivery, if he does not take up and require to be canceled the bill of lading, whether it be a shipper's order or a straight bill of lading. If the carrier delivers to the person holding the bill of lading it is discharged. The provision requiring the

carrier to cancel and take up the bills of lading, was for the purpose, as held in the case of Colgate vs. Pennsylvania Railway Co., 102 N. Y., of protecting bona fide holders thereof, and for the convenience and facilitating of commercial transactions. The Supreme Court of this State on January 20, 1906, in the case of Arkansas Southern Railway vs. German National Bank, in an opinion delivered by Mr. Justice Battle, gave this construction to the provision of the statute under consideration. In delivering the opinion in that case, he said: "The responsibility of the carrier for the goods continues after their arrival at the place of destination until they are ready to be delivered, and the owner or consignee has had a reasonable time and opportunity to examine them and take them away. If they are not called for by the party entitled to them within that time, it is the duty of the carrier to retain them until they are claimed, or store them prudently for and on account of the owner. His responsibility as a carrier ceases; he becomes liable for the goods as a warehouseman. He is responsible either as a carrier or warehouseman until the goods are properly delivered. The bill of lading is evidence of that obligation. *For the enforcement of these duties and the protection of the parties in interest the statutes of this State provide.*"

Judge Battle then sets out fully the provisions of the Act of 1887, and continuing, holds: "Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contends that the statutes are in conflict with the clause of the Constitution of the United States which vests Congress with the power to regulate commerce among the States. But they are not in conflict. It is the *duty of the carrier to deliver the property specified in the bill of lading to the legal holder thereof.* The object of the statute and the effect, if obeyed, is to enforce this duty and protect the rights of the holder."

The decision of Mr. Justice Riddick in the case of Nebraska Meal Mills vs. St. Louis Southwestern Railway Co., 64 Ark., 169, is not contrary to the view expressed herein, that no distinction is made in shipper's order and straight bills of lading so far as the obligation resting upon the carrier to require a surrender and cancellation thereof before delivery of the property is concerned. In the Nebraska Meal Mills case the court, through Mr. Justice Riddick, expressly held that the carrier would be responsible for a wrongful delivery. In that case the Nebraska Meal Mills Company delivered to the Missouri Pacific Railway Company at Stella, Nebraska, a carload of meal for shipment to E. D. Russell at Altheimer, Ark., and took from the Railway Company a straight bill

of lading, that is, a bill of lading showing the Nebraska Meal Mills Company was the consignor and E. D. Russell was consignee. The Meal Mills Company then, without notice to the Railway Company, drew a sight draft on Russell, the consignee, for the price of the meal, attached to it the bill of lading and had the same forwarded to a bank at Pine Bluff for collection. The bank presented the draft for payment, but Russell was insolvent and failed to pay. The St. Louis Southwestern Railway Company, which had received the meal as connecting carrier, having no notice that a draft had been drawn on Russell and sent for collection, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal to Russell without requiring the production of the bill of lading. The Nebraska Meal Mills Company brought suit against the St. Louis Southwestern Railway Company for damages, alleging that the delivery under the circumstances was wrongful and resulted to its injury. The court in passing upon this state of facts held that the Railroad Company made the delivery strictly in accordance with the requirements of the bill of lading which evidenced the contract made with the plaintiff, and that the consignor had no right to complain. It was not held, however, that if the bill of lading had been transferred by the consignee, who alone had the right to transfer it, that a delivery to the consignee simply because the bill of lading was a straight bill of lading and directed delivery to him, would have protected the company against the claim of a transferee of the consignee. To the contrary, after quoting the statute, Judge Riddick said: "We are of the opinion that this Act does not affect the right of the carrier to deliver *except in those cases where the bill of lading has been transferred*. [The italics are mine.] Bills of lading are frequently transferred as security for loans and advances, and the purpose of this statute was to protect those who make advances upon the faith of such transfers. The case of Colgate vs. Pennsylvania Company, 102 N. Y., 120, cited by counsel for appellant, arose under a statute similar to our statute, but in that case the bill of lading *had been transferred* by the consignee named therein, and as it was issued without the words 'not negotiable' upon it, the court said that the carrier was bound to know that it may have passed into other hands and become the property of others than the consignee. The carrier was held liable because by an assignment of the bill of lading the title to the property had been transferred from the consignee to the plaintiff in that case. *The case thus came squarely within the scope of the statute, which, to protect purchasers and others advancing money*

upon bills of lading, requires the carrier to deliver only upon surrender of such bills of lading; but in this case the bill of lading was not transferred, the rights of no third party are involved, and neither the statute nor the decision just referred to has any bearing upon the question to be determined." [The italics are mine.]

THE EFFECT OF THE PROVISION OF THE ACT OF 1887, PROHIBITING
A CARRIER FROM GIVING A BILL OF LADING FOR PROPERTY
NOT ACTUALLY IN ITS POSSESSION.

The Act of 1887 provides that: "No master, owner or agent of any boat or vessel of any description, forwarder or officer or agent of any railroad, transfer or transportation company, shall sign or give away any bill of lading * * * for any merchandise, etc., by which it shall appear that such merchandise * * * has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board, or delivered to such boat, vessel, car or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading."

In the case of *Pollard vs. Vinton*, 105 U. S., 8, it was held that the transfer of a bill of lading "does not preclude all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense." And in the same case it was held that: "Neither the master of a steamboat nor its shipping agents at points on the rivers of the interior where cargo is received and delivered can, by giving a bill of lading for goods not received for shipment, bind the vessel or its owner, and the bill is void even in the hands of a transferee in good faith and for value."

In the case of *Friedlander vs. Texas & Pacific Railway Co.*, 130 U. S., 416, it was held "that a bill of lading fraudulently issued by the station agent of a railroad company without receiving the goods named in it for transportation, but in other respects according to the customary course of business, imposes no liability upon the company to an innocent holder who received it without knowledge or notice of the fraud and for a valuable consideration."

It thus appears at common law that the railroad company was not liable to the holder of the bill of lading issued by its agent for goods not received by it, and that it was not bound by the fraudulent acts of its agents and servants in issuing bills of lading for property not

delivered to it for shipment, upon the ground that they were authorized to issue bills of lading only upon receipt of the property for shipment, and that their fraudulent acts in issuing bills of lading without receipt of the goods was beyond the scope of their duty. It was further held, notwithstanding bills of lading were made negotiable by provisions of the statute, that the negotiability given them did not preclude an inquiry into the original transaction, or prevent a carrier issuing it from setting up any equity as against any holder that it would have against the party with whom it contracted, the original transferrer. The statute quoted protects innocent third parties against such frauds and makes the bill of lading available as a security in the hands of such third person and the railroad company liable thereon, notwithstanding the property was not in the possession of the railroad company at the time the bill of lading was issued or subsequently received by it. But the question arises at once whether the statute of this State would protect an innocent holder of a bill of lading issued by a railroad company in another State where there is no such statutory provision. In such a case the law of the place of the contract would control, and the innocent holder in this State of the bill of lading would not be protected. It is unlike the provision of the statute prohibiting the railroad company from delivering the property except upon a surrender and cancellation of the bill of lading. That provision operates upon all railroads in this State as soon as the property comes within this State, it being a provision for the regulation of the business of carriers within the State and within the powers reserved by the State.

And it is unlike the provision of the Act that makes bills of lading negotiable, which gives to the transferee the right to sue in his own name, as this is in the nature of a statute affecting the remedy, and like statutes of limitation, controlled by the law of the forum, or the place where the suit is brought for the enforcement of the contract.

Banks, in handling bills of lading as collateral security for loans, necessarily acquire bills of lading representing shipments of commodities originating in other States. This necessitates an inquiry by the bank into the statutory provisions of those States, and it can not be said, in any case, that the security is effectual in the hands of the bank, unless it is known what the statutes of the State where the shipments originate are, with reference to the duty imposed upon the carrier of having in its possession or under its control the commodity, at the time bills of lading therefor are issued. In the absence of statute the common law would control, and if

the goods were not received the carrier would not be liable. Of course, cases of fraud of the character mentioned are rare, and the bank has always an action against the person presenting to it the bill of lading for money had and received thereon, or if the advance is evidenced by note, its cause of action on the note. This case presents the very strongest reason for National legislation on the subject so as to prescribe a uniform bill of lading, and impose duties upon the carrier issuing the bill of lading with reference to receipt of the goods that are uniform throughout all the States.

AS TO THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Under Section 8 of Article 1 of the Constitution of the United States it is provided that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The question arises at once whether the Act of March 15, 1887, under consideration, is in conflict with this clause of the Constitution of the United States. Congress has not legislated upon the subject, and in the absence of National legislation the States may pass laws regulating commerce within their borders, provided such laws do not impose burdens upon interstate commerce. In relation to the power of Congress to regulate commerce in cases of this kind, it is said that it is not its mere existence but its exercise by Congress which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional legislation. *Sturgis vs. Crowninshield*, 4 Wheat, 122, 193; *Western Union Telegraph Co. vs. James*, 162 U. S., 655; *Covington Bridge Co. vs. Kentucky*, 154 U. S., 204.

The Supreme Court of this State, in the case of *Arkansas Southern Railway Company vs. German National Bank*, decided on January 20, 1906, held that the provision of the statute prohibiting carriers from delivering the property covered by bills of lading except upon surrender and cancellation thereof, was not in conflict with the above clause of the Constitution of the United States. This ruling is supported by many decisions of the Supreme Court of the United States. At common law it is the duty of the carrier, whether the shipment is State or interstate, to deliver the property specified in the bill of lading to the legal holder thereof. The duty of the carrier in that regard was very fully set out in the case of *The Thames*, 14 Wall., from which I have heretofore quoted. In that case the shipment originated at Savannah, Geor-

gia, and terminated in the city of New York. Shipper's order bills of lading were taken in the name of the shippers, Bennett, Van Pelt & Company, and these bills of lading passed to a bank which discounted a draft drawn upon Bennett, Van Pelt & Company of New York, the shippers, by one of the partners who resided in Savannah, Georgia, for the payment of the cotton covered by the bills of lading. The steamboat company delivered the cotton in New York to Bennett, Van Pelt & Company, the consignor, without requiring the surrender of the bill of lading, and without making inquiry to ascertain whether the bill of lading had been transferred. The court in that case said: "No argument is needed to show what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for cotton stipulating for a delivery to order the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong person that the endorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given."

This decision has been followed in a long line of decisions by the Supreme Court of the United States. Now the provision of the statute of this State, prohibiting a delivery except upon surrender and cancellation of the bill of lading is for the purpose of requiring a right delivery, it being enacted for the protection of bona fide holders of bills of lading. It does not impose any burdens upon carriers engaged in interstate commerce. It requires them to make a right delivery, which they are required to do at common law, and the provisions requiring a surrender and cancellation of the bill of lading are simply provisions for insuring the performance of the duty of making a right delivery. While the provisions are for this purpose and prescribe the form in which delivery shall be made, they have the wholesome effect of protecting bona fide holders of bills of lading.

Under the common law it is the duty of the carrier, as we have seen, to safely transport and deliver goods. The duty as to delivery is to the right person, and it is liable for any wrongful delivery. Our statute as to delivery prescribes only reasonable safeguards to insure rightful delivery and is in aid of its common law duty. It is designed to protect a person who suffers loss by a violation of the common law duty, and in the absence of legislation by Congress, State legislation on the subject must be considered in aid of interstate commerce. What is the surest guaranty to an assignee of the symbol of property a carrier is transporting that his title will be

maintained and his security made effectual? It is that the statute protects him against a wrongful delivery of property for which he holds a paper symbol—the muniment of title. The statute under consideration does not contravene the Interstate Commerce clause, and the case of *Chicago, Milwaukee, etc., Railway Company vs. Solon*, 169 U. S., 137, is directly in point. In that case the court says: “Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of non-feasance and misfeasance committed within its limits. *If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and to punish.* [The italics are mine.] The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not within themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.”

In the case of the *Western Union Telegraph Company vs. James*, 162 U. S., a statute of the State of Georgia required every telegraph company with a line of wires wholly or partly within that State to receive dispatches, and on payment of the usual charges transmit and deliver them with due diligence, under a penalty of \$100. The court held that the statute was a valid exercise of the power of the

State in relation to messages by telegraph from points outside of it and directed to some point within the State.

The court in that case, at page 662, says: "While it is vitally important that commerce between States should be unembarrassed by vexatious State regulations regarding it, yet, on the other hand, there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the State over the subject."

BANQUET
GIVEN TO THE
JOINT MEETING
OF THE
Arkansas and Texas Bar Associations,
BY THE
LOCAL BAR OF TEXARKANA,
AT THE
Miller County Courthouse, July 12, 1906.

As onward we journey, how pleasant
To pause and inhabit awhile,
Those few sunny spots like the present
That 'mid the dull wilderness smile.
But Time, like a pitfall, as master,
Orics "onward" and spurs the gay hours,
And never does Time travel faster
Than when his way lies among flowers.
But come, may our life's happy measure
Be all of such moments made up;
They're born on the bosom of pleasure,
They die midst the tears of the cup.—*Moore*

MENU.

"That all-softening, overpowering knell,
The tocsin of the soul,—the dinner bell."

Clap to the doors! Watch tonight; pray tomorrow, Gallants,
lads, boys, hearts of gold, all the titles of good fellowship come to
you. What! Shall we be merry?—*Henry IV.*

MUSIC.

"Is there an heart that music can not melt?"—*Beatrice.*

Manhattan Cocktail.

"Nor shall our cups make any guilty men:
But at our parting, we will be as when
We innocently met."—*Ben Johnson.*

Salted Almonds.

"Pray take them, Sir—Enough's a feast,
Eat some and pocket up the rest."—*Horace.*

Cantaloupe Frappe.

"For if you do but taste this cold,
 'Twill make your spirits rise."—*Burns*.

Queen Olives.

"My salad days
 When I was green in judgment, cold in blood."—*Antony and Cleopatra*.

Tomato a l'Epicure.

"Oh, herbaceous treat!
 'Twould tempt the dying anchorite to eat,
 Back to the world he'd turn his fleeting soul
 And plunge his fingers in the salad bowl."—*Sydney Smith*.

G. H. Mumm's Extra Dry.

"Take wine like this, let look of bliss
 Around it well be blended;
 Then bring wit's beam to warm the stream
 And there's your nectar splendid."—*Moore*.

Stuffed Crabs a la Diable.

"Worthy to thrill the soul of sea-born Venus,
 Or titillate the palate of Silenus."—*W. A. Croffutt*.

Noisette de Filet de Boeuf a la Financiere,
 Pommes de Terre Saratoga Petit Pois.

"When a Lawyer, in brief, unduly does boast,
 The court with alacrity hands out a roast."—*From the lost Pandock*.

Frozen Fruit Cup.

"An't please your honor," quoth the peasant,
 "This same dessert is not unpleasant."—*Pope*.

Spring Chicken en Casserole.

"I hear the strain of strutting chanticler cry cock-a-doodle doo."—*Tempest*.

Asparagus a la Vinaigrette Salad.

"Yet shall you have to rectify your palate,
 An olive, capers, or some better salad."—*Ben Johnson*.

Bisque Glace a la Diplomate.

"I always thought cold victuals nice.
 My choice would be Vanilla Ice."—*Holmes*.

Opera Wafers.

"Such dainties to men their health it might hurt,
 It's like sending them ruffles when wanting a shirt."—*Goldsmith*.

Fromage.

Crackers.

"I will make an end to my dinner,
 There's pippins and cheese to come."
 —*Merry Wives of Windsor, Act I, Scene II*.

Fruit.

"How gladly then he plucks the grafted Pear
Or Grape that dims the purple tyrants wear."—*Horace*.

Cafe Noir.

"Coffee that makes the politician wise,
And see through all things with his half shut eyes."—*Pope*.

Creme de Menthe.

"Serenely full the Epicure would say,
Fate can not harm me, I have dined today."—*Sydney Smith*.

Cigars.

"Sublime tobacco! Which from East to West
Cheers man's labor or soothes his rest."—*Byron*.

"To all, to each, a fair 'good night,'
And pleasing dreams and slumbers light."—*Marmion*.

TOASTS.

"The lawyers are met, the judges all ranged—a terrible show."
—*The Beggars Opera, Act III, Scene II.*

Hon. H. M. Garwood, Houston, Toastmaster.

"Here's to the maiden of bashful fifteen;
Here's to the widow of fifty;
Here's to the flaunting, extravagant queen,
And here's to the housewife that's thrifty!
Let the toast pass, drink to the lass;
I'll warrant she'll prove an excuse for the glass."—*Sheridan*.

"Spirits, Tangible and Intangible"—Hon. Robt. L. Rogers, Little Rock.

"Two meanings have our lightest fantasies,
One of the flesh and of the spirit one."—*Lowell*.

[Attorney-General R. V. Davidson, of Austin, Texas, was here called upon to respond to the toast.]

"The Gladsome Light of Jurisprudence"—Mr. Justice Brewer,
Washington, D. C.

"Our human laws are but the copies more or less imperfect of the
eternal laws, so far as we can read them."—*Frøude*.

"The Young Lawyer"—Mr. F. Charles Hume, Jr., Houston.

"Only think of Cockle Graves having gone and done it."—*Distract*.

"Universal Peace"—Judge U. M. Rose, Little Rock.
(Judge Rose was compelled to be absent and as a substitute, President Stayton was called upon and responded to a toast, "The Texarkana Girl.")

"War will never yield but to the principles of universal
justice and love."—*William Ellery Channing*.

"The Legal Conscience"—Judge Yancey Lewis.

"Law is a sort of hocus pocus science, which smiles in your face while it picks your pocket."—*Charles Macklin*.

"The Weight of Authority"—Judge Selden P. Spencer, St. Louis.

"Let us consider the reason of the case,
for nothing is law that is not reason."—*Str John Powell*.

"Natural Gas"—Judge J. D. Conway, Texarkana.
(Judge Conway's response was not preserved by the stenographers.)

"Blessed is the man who, having nothing to say, abstains from
giving us wordy evidence of the fact."—*George Elliot*.

"The Certainty of the Law—if Any"—Mr. L. H. Mathis, Wichita Falls.

"Strange all this difference should be,
Twixt Tweedledum and Tweedledee."—*John Byrom*.

"Who says the Age of Song is o'er
Or that the mantle, finely wrought,
Which hung around the Bard of yore,
Has fall'n to earth, and fall'n uncaught?
It is not so: the harp, the strain,
And souls to feel them still remain."

TOASTS.

SPIRITS, TANGIBLE AND INTANGIBLE.

BY ATTORNEY-GENERAL ROGERS, OF ARKANSAS.

Mr. Toastmaster and Gentlemen:

"He played on a harp of a thousand strings, and spirits of just men made perfect." If this were my text I could probably follow it, although I am talking to just men, or perhaps it would be more correct to say, just talking to men. "Spirits, Tangible and Intangible!" I am not supposed to discourse to you spiritually nor to deal out spirits to you in any other way. The fellow who suggested this subject evidently had spirits on his mind and perhaps had some somewhere else. He was thinking of the word "tangible" instead of tangible. Who said I selected my own subject?

There are a multiplicity of spirits, corporeal and incorporeal, tangible and intangible, that I could dwell upon for an indefinite length of time, but I fear your patience would not last, nor the spirits. It is not at all necessary that we turn this banquet into a circle—a spiritual seance, in order to understand some few miraculous things concerning spirits intangible. Some of the numerous definitions of spirits, intangible, speak of the spirit as being the breath, leaving the body, etc. Now, I have heard of instances where, after a little seance with "tangible spirits," this same breath would have been very accommodating had it left, chased itself around the corner, or at least disguised itself. That, this, these or those "spirits" are capable of identification through all the five senses, yea, six of them—feeling, seeing, tasting, speaking, hearing and smelling. They speak for themselves. The hearing qualities of spirits tangible are demonstrated about 5 a. m. when you sneak up to where the front door of your domicile is, or ought to be, or once was, and, with a latch key in one hand you make a geographical search for an opening known as the keyhole with the other. You finally locate the keyhole, and, in good spirits, hum that good old hymn, "Prone to Wander, Lord, I Feel It," when up flies an upstairs window, out pops an angelic head, and, as the odor of your spirit breath permeates the air, you hear something the like unto

which—but say, that is no spectre, ghost, spirit or dream and I will indulge no more in nightmares. I do not care to mar the pleasure of any of you gentlemen by calling to mind familiar scenes. I am telling no tales—I like all of you.

There is no occasion for anything unpleasant to enter this body—I am speaking collectively. We are in good spirits, and good spirits are all about us, or were, and the “spirits” here seem to be “going into pretty good society.” This subject, “Tangible Spirits,” is a serious one, but furnishes little food for thought. However, I am not kicking about my subject—it’s not so dry; and it takes something wet to wash down the food. The committee on assigning subjects were very explicit—as much so as the boy who drew a picture on his slate and wrote under it, “This is a kow.” For instance, “Natural Gas,” Judge Conway. Everybody knows how natural it is with him.

This subject of spirits, however, is a deep one—so deep that some say you can drown your troubles in it. Yes, gentlemen, and many poor, unfortunate brothers have drowned their minds in spirits, have drowned their fortunes, have drowned their honor, something seldom redeemed, for Shakespeare says,

“You can not pluck up drowned honor by the locks.”

Really, gentlemen, I did not intend to bring Shakespeare into this discussion tonight. I hope his spirit is at rest. I do not like to talk about a man in his absence, but the other night, when my wife got the better of me in an argument, or at least the last of it, I said, on the “spur of the moment,” that I believed his story of “The Taming of the Shrew” was not founded upon facts. If he were living today I think the broomhandle factories throughout the country could well afford to pension him. Of course, I have no figures as to the output of handles utilized in convincing erring benedicts who have attempted to follow his advice of the impracticability thereof.

But let us go back to the spirits again—no, no, thank you; I mean “spirits intangible.”

There is one class of intangible spirits that sometimes one can feel, vivacity, animation, fire, courage, enthusiasm, etc. This can be produced by tangible spirits—something you can get hold of. Then there is another class, a spectre, an apparition, a ghost—and other things, superinduced by different causes—sometimes by tangible spirits. Lord Bacon said: “All bodies have spirits and pneumatic parts within them,” and directly under this quotation from

Lord Bacon the Universal Dictionary defines spirits as being "A liquid obtained by distillation, especially of alcohol, the spirits of wine." We can't deny being a body. A foreigner, learning our language, would have great difficulty in understanding our definition of spirits. It's hard to tell at times whether we are defining tangible or intangible spirits. It is the way you mean it, not the way you say it. During the late lamented campaign in Arkansas I was compelled to miss an appointment to speak at a picnic in a certain county. When I saw that I could not be there with my battle-ax to trim the octopus, I wired a friend I could not come, but to tell all the boys that if I was not there in person I would be with them in spirit. The operator spelled it "spirits," and Bill Jones wired back: "Suits the boys just as well; send the jug by first express." Bill has a soul, as all men have, and, like most men who have souls, is very fond of "spirits," but he detests "soulless" corporations. I had to get up to that in such a roundabout way that I don't know whether I made the point clear or not. If I did not, later on, when I get a little more spirits aboard, I'll repeat it, if you want me to.

Some excellent papers have been read at the meeting of this Bar Association—great subjects have been discussed; subjects dealing with cold, musty law points, dry subjects, I might say, and other subjects have been covered fully. Even my subject has been pretty fully covered, but I hope it will not dampen the ardor of any gentleman here, although it does sound as if it were calculated to dampen things. I wish to say, and say it most emphatically, too, that while this is a meeting of the bar, it is not supposed to be a meeting of the "bar-tenders." A traveling man said today that it was a meeting of the "bar-attenders." I do not appreciate such wag-gish remarks, for among the ignorant the distinction is too hard to draw. "Spirits, Tangible and Intangible," is purely a legal question, and offers a coveted theme for the lawyer with an analytical mind, and an inclination to unravel an abstruse proposition. The subject can be successfully discussed by a woman without any reference to beverages, but a man can't so discuss it. He discusses it in a wholly different manner. I am trying to do it in a wholly indifferent manner. There are men here who are perhaps too opposed to the use of spirits as a beverage. I have not met any of them, but they may be here, and there may be some that have had a few rounds with Bacchus. The latter are the fellows who can soar so high, paint on the sky with an ethereal brush, and sing with a tongue loose at both ends, the songs of the "wine god," in such

a way that you think of but one class of spirits, the class that warms you here and helps to warm you hereafter.

There have been so many puns on the bar, and sometimes the bench, that it is enough to make us more sensitive than we are. The bench and the bar are closely allied, 'tis true, but it does not necessarily follow that the bench frequents the bar, any more than that the bar frequents the bench. That last sentence sounds a little out of order, but it was the best I could do with it under the circumstances. "Spirits, Tangible or Intangible," furnishes something to talk about, think about and write about. Abraham Lincoln's favorite poem, "Oh, Why Should the Spirit of Mortal Be Proud," had nothing to do with spirits tangible. I do not even know that mortal spirits are proud, but I do know that whether they are proud or not has nothing to do with my subject.

However, gentlemen, though our spirits are above par tonight, there may be a drop in the temperature by tomorrow morning and we may just as well enjoy ourselves.

This Association showed spirit in their work, their discussions and their deliberations. Spirits always show in discussions.

Really, gentlemen, I do not like to have a subject at a banquet—there are other things I enjoy more. I am like an old negro preacher who said he would rather 'zort dan to preach, "cause," he said, "when you preach you got to stick to de tex' and when you 'zorts you can branch." I may have had a text but I have "'zorted" most of the time tonight, as you have perhaps discovered.

As I understand it, the object of this meeting tonight is not for serious discussion—not for the juggling of too weighty subjects; we require, and are entitled to some recreation, for "all work and no play makes Jack a dull boy." That's a new quotation, and is said to have inspired our new national hymn—"Everybody Works But Brewer."

We are privileged, too, to take a broad view of things. We can, if we like, talk about spirits in a serious mood, or otherwise—or we can talk about anything else we please. This is the only place where the practitioner stands on equal footing with the court. We can jolly the judge here if we want to, and he can not fine us for contempt, for we have no judges at a Bar Association banquet. Every man here can have full sway, unless he sways up against some one else who is swaying. Every man can indulge in free speech, except the fellow with the "muck-rake." That kind of a fellow would last but a short time here. While I have talked on a subject that might lead some to believe I was dealing in liquids, there has been no mention of oil—Standard or otherwise.

And if you will take time to go to the "meat" of my subject, you will find that it has nothing to do with the packers' investigation, and, as I am not a hog, I expect that I had better draw to a close. I trust these local references touch upon nothing that will conflict with the interests of the respective Associations. While you gentlemen from the Lone Star State have herds on a thousand hills—I mean prairies—and 10,000 prairie-dog holes in every prairie, and three politicians for every hole, it does not signify that you have trusts. We, here in our beloved Arkansas, are packers—not of juries, but of delicious fruits and vegetables, of such quality and in such quantities that geography is now being taught in the schools by asking, "Where is California, anyhow?" This has been a great joint meeting of the attorneys of Texas and Arkansas. I do not use the word joint in its modern acceptation, but in its ancient acceptation. You Longhorns from Texas have a right to be proud of your State and its history. A history made by the deeds of such matchless men and patriots, Austin, Houston, Roberts and Reagan and others, can not fail to be a wonderful and imperishable history. The deeds of such men can not perish. Age can only give them greater luster. I am glad tonight that the spirits of these great men are with us, and I am glad that the spirits of Arkansas' great men, Pike, Conway, Ashley, Cockrill, Garland and others are with us; but I am especially pleased that Arkansas' most distinguished citizen, Judge U. M. Rose, is with us both in spirit and in person.

Gentlemen of the Bar, I have enjoyed this outing and most of all the "innings"—the "innings" perhaps more than the outings. I have enjoyed it all, and now, in these spirits and in those spirits, and in all good spirits, I bid you a spiritual good-night.

THE GLADSOME LIGHT OF JURISPRUDENCE.

BY MR. JUSTICE BREWER, OF WASHINGTON, D. C.

Mr. Toastmaster and Gentlemen:

Many years ago I was judge of the district court in the First Judicial District of the State of Kansas, which at that time contained about one-third of the population and furnished about one-third of the business, civil and criminal, in the State. The State Penitentiary was located three or four miles south of Leavenworth, my home. The warden was a particular friend and conceived the idea, which he carried out for a series of years, of giving the prisoners a Fourth of July celebration; and on the first occasion, as well as for many subsequent years, my Fourth of July speeches were delivered in the Kansas Penitentiary. At the time of this first celebration probably one-third of the inmates had received their sentences from me, and when Major Hopkins introduced me he said to the audience, "Perhaps some of you know who Judge Brewer is," and one man whom I had sentenced to eighteen years for manslaughter spoke in an audible whisper, "Yes, I have heard one too many speeches from him already." I hope, after listening so patiently to me this morning, you do not feel like repeating these words of the Kansas convict.

When I received the invitation to come to this meeting I was drawn in two ways: I felt that it would be so hot that I should suffer much; but, on the other hand, there were matters which made Arkansas and Texas very close to my heart. Twenty-two years ago last April I commenced my services as a Federal judge and the first place in which I held a Federal court was in the city of Little Rock, in the State of Arkansas. In that city and at the bar of that State I met some great lawyers, great as any I ever have met; some of whom have passed up to render their final account; others, like our distinguished friend Judge Rose, living to bless and honor us. When I heard that he was to be here I felt that I must come for the pleasure of meeting him. It makes me, as an American citizen, feel proud to know that a man of his culture and learning is to represent this country in the coming great Hague Conference. I am one of those who believe in the settlement of every international dispute by arbitration rather than by the sword. Permit a word of personal reminiscence. Near the close

of the arbitration between Venezuela and Great Britain for the settlement of their boundary, Sir Robert Reed, one of the counsel of Great Britain, now her distinguished Lord Chancellor, left, saying that he was hastening back to London to do what he could to stay what seemed and was in fact an impending war with the Boers. In the talk which I had with him (and I shall never forget it), he said: "I have no doubt of the outcome of the war which I fear is going to come. We shall conquer the Boers, we shall attach their country to our nation, but it will cost us thousands of lives and millions of dollars, and, what is far worse, it will leave a race hatred between the settlers there and their English conquerers which a generation will not efface." The outcome has been as he predicted. England lost thousands of lives and spent millions of dollars conquering the Boers, but the race hatred endures and will endure for generations. I said to him: "Sir Robert; how much better is the way we are settling this controversy between Great Britain and Venezuela, for when it is all settled and the boundary fixed between these two disputing nations, neither nation will have spent as much as a million dollars and not a single life will have been lost. No woman at home will be weeping over husband, brother or son dying on the distant battlefield." Not a single life was lost, the dispute was settled, and while neither nation got all that it claimed, each received enough, and there is peace between them. So when I heard that Judge Rose was appointed a delegate to this coming Hague Conference, knowing him as I have for the last twenty-two years, I felt sure that he had heard and felt the echo of the only song of Heaven ever heard by the children of men, the song of the angels over the shepherds at Bethlehem, "Peace on earth, good will toward men." And I am sure, that, standing in that conference, he will well represent this great Republic as a leader in the cause of peace, and work for the coming of that day "when the whole earth gives back the song that now the angels sing."

I have also a very tender feeling for the State of Texas. Ten years ago last fall, a daughter was stricken with consumption and, under the advise of physicians, I brought her to San Antonio. There, cared for by her mother and sister, she lingered for a few months, and there she died. I was there myself a part of the time. I shall never forget the kindness and courtesy, the tenderness with which I and my family were treated by the citizens of San Antonio. It is a sad, sweet memory that gathers around these hours. Sad in the loss which came into my life. Sweet in the

gentleness and tenderness which were manifested by the people of San Antonio. So when the invitation came, although I shrank from what I feared would be excessive heat, I felt that I could not do otherwise than respond, yes, and I am glad that I came

I have enjoyed this magnificent gathering of the lawyers of Arkansas and Texas, and I have listened to the papers presented with the most profound interest. There has been a lifting up, an elevation in the character of each paper far above that which you often find in a gathering of lawyers or a gathering of any other class. There has been no cheap rhetoric, no appeal to passion, no demagogic utterances, but every paper seemed to move along high lines, and speak to every lawyer, urging him to lift up his life to something better and nobler, making the profession that which it ought to be, the glory and the strength of American civilization and the great bulwark of republican institutions. I know that there are many today, in and out of the profession, burdened by the commercial spirit, who measure all things by their cash value in Wall Street; and it is cheering to hear utterances from distinguished men in our profession which lift the soul up above the beggarly matter of dimes and dollars; to hear these appeals to the everlasting principles of right and justice, to that loftiness of purpose and character which make one's heart beat high. They say the young men have ideals; the old have not. The ideals of every honest man are purity, strength and the capacity of uplifting others. Must one as he grows old become sordid, and be crushed by the close penury and base immoralities of life? I do not believe it. There are many of us who cling to the ideals of our youth, and cling all the more closely as we think of the sweet blessings they bring. The poet says:

Men take the pure ideals of their souls
And lock them fast away,
And never dream that things so beautiful
Are fit for every day.
So counterfeits pass current in their lives
And stones they use for bread,
And starv'ingly and fear'ingly they walk
Through life among the dead.
Though never yet was pure ideal
Too high for man to make his real.

Fear not to build thine eyrie in the heights
Where golden splendors play,

And trust thyself unto thine inmost soul
In simple faith alway;
For God will make divinely real
The highest forms of thine ideal.

And to hear as I have heard the eloquent and earnest words fall from this platform in the last few days, makes one sure of a strong, earnest and loving spirit actuating the bar of Arkansas and Texas, holding up before all ideals of professional life; and so feeling, I go away, grateful to you for your kindness and hospitality, and with precious memories centering here which will last until time shall fold this body in the cold embrace of death.

THE YOUNG LAWYER.

BY F. CHARLES HUME, JR., OF THE HOUSTON BAR.

Mr. Toastmaster, Fellow Practitioners, and Young Lawyers:

I feel that I need no introduction to the lawyers of America. In this distinguished company, I feel assured that I do not speak in a stranger's voice—but in my own. For many years my name has been a household word among the members of my own—family. Whether the premonitory rumbles of coming greatness have prevented me here, I know not. In my own State, I am not known solely as a lawyer. My fame is also titular; I am called “Judge” by the obsequious office-boy, and by the janitor—“where thrift may follow fawning.” But my pre-eminence rests on no firmer foundation than authorship of a work on an important legal subject. And in justice to myself, and to my State, I must say that I owe my juristic rank, and such name and fame as I bear, to my—“*domestic relations.*”

It would be superfluous for me to say that this is the happiest moment of my life, because it is—not. After-dinner speaking is an effort to appear at ease and happy, though fearful and tumultuous. It is the *patti-de-foi-gras* of oratory—a conditional, rather than a normal, mode of expression. The archetype of the art is the impromptu speech. It is oft an unplumed squab for flight, and heavy with “the stuff that dreams are made on”—the art that’s long when time is fleeting. It attains its perfection *ex post facto*, or retroactively; that is, after the banquet hall’s deserted and the speaker is homeward bound alone. How pregnant then and cheerful are the words of philosophy: Sweet are the uses of—retrospection.

Upon this occasion, I urge no claim to powers of off-hand eloquence, I can not say, and it would be vain and unjust for me to assert, that this is an extemporaneous effort. The weight of the internal evidence would crush the contention; and the faithful years of laborious preparation would shrink aghast at such wild asseveration, and put to shame my base ingratitude. On the contrary, behold in me the sophomoric apostle of the midnight oil—a sedentary sacrifice to a young life’s masterpiece!

From the lawyers of Texas I come—unarmed—bringing to you

the message of civilization. Without hope of reward, and without fear of recognition, I have come to lend the charm of high professional character, and impart tone, to this meeting. It is not to me, however, that your thanks are due for my presence here. It was my brethren of the bar that sent me on this mission, conscious of its perils. I will not shield them. It was they that did command and hasten my departure hither, with the classic Spartan adjuration: "Go: come back with your nerve or on it!"

Gentlemen, I am a modest man, as all men are that say they are. And my chief characteristic, aside from physical pulchritude, is candor; that is, I am a blunt man, even to the point of dullness. Yet I clearly perceive that there is a solemn duty devolving upon those of us that have attained the heights, to cast benign glances upon the young lawyers struggling in the valley below. For at last the young lawyer is the hope of the profession, just as he is the despair of the trial judge.

This evening I shall not shirk my grave responsibility. I shall "a round unvarnished tale deliver," presenting the subject in its static and dynamic aspects; and undertaking to impress upon the young lawyers the lessons to be drawn from the careers of the eminent men that adorn our profession. And this, notwithstanding I must speak largely of myself—a part of my practice I have always had the tenacity and good fortune to hold.

From childhood, my favorite form of composition has ever been autobiography. I despise shams and pretenses. A man should be what he is, and say what he is. I do not pretend to be a great lawyer—I am! Is it come to pass, forsooth, that greatness is a mockery? In these untoward days, must we needs forswear our fundamental convictions? Not I, Gentlemen. My position is sustained by the highest authority in the land. Without specific citation, I refer you to my own edition of "Parents' Reports" for the leading case upon which I rely—styled, "Our Boy against The World": announcing the doctrine so dear to the young lawyer as the bulwark of his premature renown—the elemental principle, so tenderly expressed by the fireside poet: "Whatever mother says, is right."

And yet I was once a young lawyer. And today I love the young lawyer, even as I do myself; and all that I shall say will proceed from an impulse to do him good. I am neither "case"-hardened, nor embittered by "multiplicity of suits." I shall be cruel only to be bright. My sympathies are broad and deep; yet I can look upon him in the "dry light" of science—dispassionately and with-

out asperity. So tonight I shall lay aside all distinctions and treat them as my equals.

The young lawyer exults in logic and analysis—he defies both. Let us contemplate him: He may be described as the *genus homo importans*—“deep on whose front engraven, deliberation sits and public care.” He is *res tota*—in the modern tongue, “the whole works.” He is great *in persona*, rather than *in rem* or *in rebus*. According to experienced trial judges, the “young lawyer” is a contradiction in terms; yet a necessary evil, whose chief function is to grow older. Like the Law, he is a process, not a completed product—university diplomas notwithstanding. In judicial opinion he is *obiter dictum*. Among lawyers, he is *sui generis*—a sort of difference without a distinction. The jurists appear to concede that he exists by presumption of law; and the weight of authority seems to be that he thrives by presumption in fact. He can scarcely be said to come within the purview of the laity: his name loometh large on his own sign—to the public it shineth as from afar—and very faintly. He is not expressly classified among the public utilities, but he no doubt has his place—the difficulty is to find it. His sphere is coextensive with that ascribed by Lord Brougham to the Law of England—to get twelve men in a “box”—and jam down the lid.

He is a peripatetic institution of learning—dedicated to his own glorification, endowed with majestic powers of his own imagining, and founded upon the three cardinal virtues, faith, hope, and charity: faith in his own infinite knowledge, hope for the obtuseness of judges and juries, and charity for the older lawyers that have all the business. And the greatest of these is faith.

He disdains to shine by reflected effulgence. He is a legal light in, and unto, himself, only waiting to be—extinguished. To him law and abstract justice are the same. He is long on theory and short on practice. With him “knowledge comes but wisdom lingers.” And until he realizes that men and all human institutions are mere approximations to perfection, and that good and evil alike are persistent forces—with juridical “eye in fine frenzy rolling,” he crouches in his lair, like a fierce giraffe, ready to leap upon quixotic provocation, to right the wrongs of an erring world. And be it said to his honor, that he stands peerless and transcendent in the domain of “Buffalo Jurisprudence,” and “Kangaroo Procedure.”

I have never talked to a young lawyer that did not “out-Herod Herod” for prosperity. It is with him not an occasional or acute

attack, but a chronic condition. As a young lawyer I had more business than I could have attended to in sixty years, and the magnitude of my income was incredible. But as I grew older, the law somehow fell into disrepute with the clients, and my coffers contained naught but "intangible assets."

The lawyer should know everything—the young lawyer does. Solomon could not have matched him. And "the memory of man runneth not to the contrary"—of his. If the old lawyer knows most, the young lawyer knows best. It is no trouble for him to tell what the law is—it is rather a surprise. But the evil day cometh apace, when, with "assurance doubly sure" and stride triumphant, he marches into court with his first case; and, enveloped in the darkness of his own pleadings, he falls into the clutches of the grisly old guerrilla, General Demurrer. Let us not paint the pathetic picture, nor voice the lamentation.

The young lawyer is gregarious—he cometh in flocks. But tremble not, my friends, at the annual increase of competitors; for though many young lawyers are called, few deliver the "merchandise." To the established practitioner the situation is not hopeless, but has its compensations. Let us be just; for we know that the young lawyer is a valuable litigious asset. And furthermore, whether we agree that the law is an exact science, we know that it hath a sort of certainty that often amounts to fatality; and that, while its policy is to put an end to litigation, its practice puts an end to many young lawyers—thus establishing in the profession a subtle relation of equilibrium between genesis, and exodus. Also let us be generous. And when the young lawyer feels that his place is precarious, and that his talents are not appreciated, and that everything is against him, let us exhort him to brace up, take courage and be firm; for conditions will change, and probably get—worse. And, my dear young friends, let me admonish you—in the melancholy hour and whatever may betide—to think always of the nobility and dignity of your profession. Keep well in your own mind the fact that you are a lawyer; and some day, perhaps, the community will discover your secret.

Stepping from the sublime to the didactic, the young lawyer should bear in mind that genius and hard work are not the same; and, lacking the former, he should acquire a great capacity for the latter. He should cultivate patience, perseverance, and resignation, and study close "Fox's Book of Martyrs." He should supplement this with frequent meditation over the episode of "Robert Bruce and the Spider"—so suggestive of the young lawyer's—activities.

Many are his tribulations—few his trials. But let him never forget, in his restless quietude, that the Constitution proclaims “due process of law” and guarantees him “a day in court.”

Make yourself agreeable to the old practitioners. Keep in touch with them. Impress them with your significance, and with the fact that you have a college education. Let them know that you are a “coming,” as well as a “going concern.” Tell them how well you are doing; that you fight cases to a finish and never let up. Blow—even as the four winds—they admire enthusiasm. Do equity by them; withhold not the worst—when you have lost a suit go to them, *pari passu*. Regale them with the law of extenuating circumstances; cover the subject—to the point of exhaustion. Try the case all over in unctious detail for their refreshment. You may get another trial—if their opinion of you has theretofore been good, they will probably—set aside the judgment.

Shun as you would the pestilence the evil spirit of commercialism in your professional conduct. Be not money-driven hirelings of a trade. I have heard that in some sections of our country, lawyers have yielded to this sinister influence, and have trailed the priceless standard of our calling in the golden dust; and have sacrificed our lofty traditions upon the altar of Mammon. Reluctantly though I confess it, I am reliably informed that lawyers in the large cities of the North and East have reduced the profession to a business; that they boldly receive money for legal services, and actually earn from this source a comfortable livelihood. And some, more daring than the rest, are said, in this doubtful manner, to have acquired fortunes. Coming as I do from a distant State, whose professional atmosphere is chaste and undefiled, I hesitate to believe the accusation. And I may add, with pardonable pride, that never in my personal experience at the Texas Bar has such an ominous condition of affairs been known to exist. My own observation has been that in Texas the rich lawyer is a paradox; and my conjecture has been that in other States, he was a “legal fiction.” Yes, my friends, in good conscience I may aver that in the imperial State from which I come, the Law, like virtue, is its own reward—at least I have found it so. And to me it is sweet to know that from the bar of my own beloved State there comes the voice of austere protestation, and the hushless cry for better things.

Esteem the Law, thy mistress: guardian angel of blind justice, and by men’s unthought appointment through the ages, her majestic voice and dread interpreter. She sits aloft upon the rock-

ribbed Mount of Right, a peaceful virgin, frowning chaos and disorder down throughout the world. To stay the hand of reckless might and turbulence, she reacheth forth; and higher yet to lift the blood-won standard of long-wak'ning man's humanity to man. From us she's hid, betimes, in mist; and from her dim retreat, 'tis sport to watch us climb, and stumble, fall, and then again essay the height. There leads no path of dalliance to her bower; to her favor, winds the stubborn royal road of honor, courage, and devotion. With the largess of content that on the faithful she bestows, nor gold, nor regal purple, nor the "wealth of Ind," nor argosy with precious stones deep laden,—e'en can vie; all these are but the greedy gew-gaws of a life misused, against the tranquil balm that waits the seal of her approval.

My friends, she is a stern mistress, "correctly cold"—and never to be completely subdued. None can hope to win her save through steadfast love—and only those whose love's requited. In the halting accents of my struggling muse:

Must be her bounty rare,
With single high intent pursued;
Although, like all the fair,
She best with "gifts" is wooed.

She scorns the vacillating heart divided; and flouts the flippant fool that would embrace her. To many men the courtship is a mere flirtation—an idle profession; and to them her charms are ever undisclosed. To the blandishments of the young man of wealth, she usually giveth the "marble heart." For a soft income turneth away resolution, and dulles the edge of endeavor. My comrades, let me warn you; do not fall under the ban—don't be a rich man's son. To the young lawyer, there is no predicament more baleful and tragic; except to be—a poor man's son.

Develop generous impulses. It is to my keen sense of gratitude that I chiefly owe my present business relations. When the world was apprised through the associated press that I had procured license to practice law, the clamorous demand usually made for the services of the young lawyer by interests in the large cities, was directed toward me. But my father, who had sent me to school, I felt had some claims upon me. So I took no account of any of the inducements offered me. I went to my father and said: "You have educated me—at least you think you have. I am grateful. You have an established practice. You need me." He replied "You are very thoughtful and considerate." And I proved

it by taking him—into partnership. And I advise every young lawyer similarly situated to follow my example—especially if he has any reverence for the three graces—food, shelter and raiment. Censure me not for paternalism. Each to his own; but, verily, my young friends, to depend on our fathers is silver; to depend on ourselves is “brass.” And lest you have cause to lament with your client, I charge you fling away self-reliance, “for by that sin fell the angels.”

May you always know the flush, but never the blush, of victory. And to this end remember that in our time under the statute *de bonis asportatis* you must be “caught with the goods.”

You will no doubt make mistakes. The man that never makes mistakes never makes anything. And to the man of indomitable will nothing succeeds like failure. “Upon our dead selves as stepping-stones we rise to higher things.” I have traveled the road myself. I want to see you successful. You have my best wishes ever. In your adversity my heart goes out to you; in your prosperity—my hand.

In conclusion—be your success, as men call it, what it may, bear in mind that change is the law of life. The watchword of progress is “move on”; and fixation is retrogression. And in this regard, doth justice ever grant fair and ample dispensation to her servitors of the law. Mindful of your solace, she hath wisely provided. And when the city’s “thick-coming” complications, and garish flare and turmoil shall have palled upon you, and you have overtaxed your “credulity in listening to the whispers of fancy”; and have pursued with vain “eagerness the phantoms of hope”—you may still answer the plaintive call of the bucolic siren for her own—and take to the tall timber! And, my dear young friends, as a prophet without honor in his own, or any other country, let me predict that I shall precede you there; and be the first to bid you welcome, in copious draughts of obscurity, back to nature and the simple life.

THE TEXARKANA GIRL.

BY JOS. M. STAYTON, OF NEWPORT, ARK.

Mr. Toastmaster and Gentlemen of the Bar:

I hope you will not think me vain enough to suppose that I regard myself as capable of responding to a toast of this nature, especially in a manner to verify the very flattering introduction I have just had. In this assembly I regard myself the most unworthy to respond to a toast of this character, because in the results along this line I have been able to accomplish, I stand here as solitary and alone as a dead tree, without branches, without the power of bearing fruit. If I had the powers of a Shakespeare, the art of a Byron or the beautiful poetry of a Moore, I could not begin to describe the womanhood of Texarkana.

I haven't had an opportunity to meet with very many of them. I don't know very much about them; but I can look around this room and see the ladies of Texarkana, in art and delicacy, know the beauty of arrangement of things; and the very highest tribute I can pay them is to testify to the splendid manhood they are raising up in the Twin Cities. I never, in all of my life, have found a more generous and hospitable people. The men here look like somebody, they look like they feel proud of themselves and their homes and proud of their wives. This is the highest tribute I can pay them, for when men bear evidence of that kind of character, I know their wives and mothers have made them so. What more can I say of the good ladies of Texarkana?

It would be immature and indelicate in me to say anything about the young ladies of Texarkana, for I have only been able to look at them as one would a bouquet of beautiful roses. They have made a lasting impression on me, but I haven't had the slightest chance to make an impression on them. Only last night, I was preparing to put my best foot foremost and was gathering myself together to spread out all my powers of entertainment, when the gentleman who sits on my right came along and took the young lady away, and a golden opportunity was lost; but that is what I always get in contests of this character.

I ant to say to you, my brethren from Texas, that I have a very warm place in my heart for you, if I have any heart. I remember a short time after I came from college, I had been working very

hard, and I told my father I needed some recreation, so I went to a certain beautiful city in Texas, and there I got it—I got it in the neck. I will tell you in confidence, that every one—I believe at that time the streets of Dallas were paved with *bois d'arc* blocks—upon every one of these blocks there is a drop of my heart's blood. I cleaned out the candy shops and soda-water stands and hired so many buggies that the livery people were glad to see me coming.

After a few days, I retired from the city to think over the matter and gather my strength, and returned to the fray; the young lady's mother came into the parlor one morning and handed me a book and asked me to read a few chapters; I think its title was "Titcomb's Advice to Young People About to Be Married." This put new life into me, and that night I was told there was nothing doing, and I caught the next train for Arkansas. I have been in Texas since and found the young lady happily married; and I may say, in this connection, every other woman I have had anything to do with is happily married. I have been the means of marrying ladies in Texas, by the dozens in Arkansas, and in Tennessee I have succeeded in marrying them off in numbers; I may say that all over this broad land of ours there are many happy homes which owe to me their existence. I never saw a good-looking woman but that I loved her, and I do not think a man is any part of a man who does not do likewise. After our treatment here I don't know what you married men are going to do when you get home—how you are going to explain to your wives why you left them at home. I am sorry I could not bring mine, but I am willing to make you this promise, the next time the Association meets in Texarkana I will get one and bring her with me.

I would like to say to you now, because this is the last opportunity I will have, I want to express to you my deep satisfaction and gratification in the manner in which you have received and treated the Presidents of the Associations. I do not suppose the pages of history will reflect a more perfect condition of manhood and courage, for we have had here over two hundred lawyers, all loaded for talk upon any subject, yet you have sat in perfect silence and lent a listening ear to many papers of greater or less length, and no one of you has interrupted, sought to express your own views upon the subjects, or moved an adjournment. Your fortitude is great and your patience is admirable. I may as well tell you, though, that Brother Garwood and I very early decided it would not do to have discussions upon the various papers, and we deter-

mined, if the opportunity offered, to shut off all discussion, except by those who were already prepared and knew what they were going to say, but you deserve the credit just the same.

Now, gentlemen, returning to the subject, in conclusion I want to offer a toast, not alone to the Texarkana Girl or the good women of Texarkana, but to a splendid type of American womanhood; not the wife, because there are occasions when the wife will not lend a sympathetic ear to all your troubles; not to the sweetheart, because there are some things you can not take to her, but to a type of American womanhood, it makes no difference how high a man is, it makes no difference how low he is, it makes no difference whether he is rich or whether he be poor, it matters not in the least if he be the veriest criminal upon the face of the earth—I speak of that one from whom and at all times you can get ready sympathy and consolation—gentlemen, I offer to you a toast to the highest type of our American womanhood—Our Mothers.

THE LEGAL CONSCIENCE.

BY YANCEY LEWIS, OF AUSTIN, TEXAS.

Mr. Toastmaster and Gentlemen of the Joint Association:

When I learned the subject to which I was to respond upon this occasion I was filled with emotion. I was like the horse thief who was pursued for three days and nights by a vigilance committee, captured and told that he would be hung in fifteen minutes, but that in the meantime the committee would hear what he had to say for himself; to which he replied: "Gentlemen, I lack words to express my sentiments." In my perturbation, I took advice of a plain farmer man, who, learning of my subject, exclaimed: "The legal conscience! Great Scott, man! There ain't no legal conscience." It saddened me to think there could be such ignorance in this age of enlightenment. I conferred with another friend, with pretensions to scholarship. He said: "I suppose you are familiar with the ancient story—how God in his mercy permitted all humankind to assemble on a great plain and allowed each one to throw away his particular misfortune, and how some threw away deformities, some maladies and chronic disease, and how a youth threw away his conscience." "That," continued my mentor, "was the legal conscience." His answer deepened my sadness, and I reflected how easily flippancy passes for wit, and how a little learning is a dangerous thing. Then I spoke to a newspaper man who had been a lawyer. He replied: "The legal conscience is as elusive as 'intangible assets' and as valuable; as voracious as 'infant industries' and as enduring; as pervasive as the requirement of 'due process' and as hard to find and to follow." I marvelled once again at the wisdom and misinformation of the press.

In the beginning, the legal conscience must be distinguished from the common, everyday conscience. The common conscience is slow and plodding; the legal conscience is like Falstaff's sack: "It ascends me into the brain; dries me there all the foolish and dull and crudy vapors which environ it, makes it apprehensive, quick, forgetive, full of nimble, fiery and delectable shapes." The common conscience is the slave of facts; the legal conscience, the master. The common conscience regards a fact as the end of the argument; the legal conscience, as its beginning. The common conscience will throw a fact at you as if it were a brick; the legal con-

science respects facts so highly that it never uses them unnecessarily, and always treats them like crown jewels, only to be exhibited on state occasions, and not then until they have been polished and made to glitter and dazzle and blind.

The legal conscience is suggestive of all dainty, delicate and aerial things. It recalls the tricky Ariel, who could "put a girdle about the earth in forty minutes." It is as much a creature of gossamer wings and phantasy as that Puck, to whom 'twas given to perceive "What fools these mortals be." It is like some exquisite relish that pricks the appetite of jaded epicures, dissolves into nothingness, and leaves only the tang of delightful farewell. It is like the music from the horns of Elfland heard faint and far across the snows in the frost of Northern nights.

Withal, the legal conscience has real existence and induces great results. In an age of graft and greed, when many of the old truths seem perishing, the legal conscience engenders in the members of our profession a primitive, a simple, a childlike faith. We believe that the record authenticated by the trial judge always speaks the truth; that officers perform their legal duty, especially the aldermen in our large cities; that the judges know the law; that the verdict of a jury based upon a scintilla of evidence and awarding our client large damages, in which we have a major interest, imports absolute verity and pure abstract justice. Sometimes the legal conscience causes us to do things which the mind of the uninformed vulgar greatly misapprehends and ascribes to unworthy motives; but why should this give us concern, who know the truth? The members of our profession love the truth so well that they always approach it with opposed statements and from opposite sides; thus they cut off any possibility of its escape. It is a fact that if we find a fat and greasy citizen, whose pocket and whose soul is yellow with gold, we lance his deepest sensibilities with a large, round fee. Do we this through mercenary motive? Not so. Money is dross to us; but thus we teach the worshipper of Mammon how futile are his hopes and how fleeting is wealth. A man kills another, and through the efforts of some member of our profession is acquitted. The record establishes his innocence of crime; but still he does not go unpunished. The aforesaid member of our profession, enlightened by the legal conscience, takes all that the defendant has, and thus punishes him, not for crime but for carelessness.

Yet there are doubting Thomases and men from Missouri, who say in their presumption and their ignorance: "Show me the

legal conscience." We reply: The elemental forces can not be shown; the legal conscience is like life which the chemist can not find nor define, but which, present, makes the human organism animate, erect, intelligent; absent, renders it a mass of mere matter. So, the legal conscience animates the machinery of justice, makes it intelligent, spiritual, soul-guided; its absence renders such machinery cumbrous paraphernalia, worthless impediments blocking the way of progress. We tell the unthinking that the legal conscience is like electricity, which no master of physics can impound or subject to analysis, but which, nevertheless, pervades all matter, makes the earth vital and with storm and sharp lightning purifies the atmosphere of noxious elements; that so, likewise, the legal conscience pervades all forms of human life and activity, makes justice vital and at times cleanses the moral atmosphere.

In words of seriousness, my brothers, it is true that sometimes the legal conscience is laggard and sometimes the sloth and comfort of wealth and prosperity may lull it into slumber; but true also is it that in times of peril and public wrong it causes the members of our profession to swarm like angry hornets and to sting to death, with fierce invective, injustice and oppression; if sometimes its light is obscured, sometimes it shines with the intolerable brightness of that light that blazed in the pathway of Saul on his way to Damascus and, like it, stays the hand of persecution and tyranny. It was the legal conscience that in the ancient time flamed in the orations of Cicero and caused him to prefer to die rather than survive the liberties of his country—with this marvel in result: life, liberty and country perished, but the glory of his eloquence defies all the centuries and is imperishable. It was the legal conscience that caused Ulpian, another of the great Roman lawyers, to go to his death rather than defend an imperial parricide; that enabled the French chancellor, d'Aguesseau, to prove himself, in an hour critical to his country's liberties, equal to the courage of his wife, who bade him forget that he had a family to lose and to remember only that he had a country to save; that gave courage to the judges in the time of Elizabeth to say to the most imperious of English princesses, "We are your loyal servants and in all things would serve you, but we must declare the law"; that inspired Coke, near the end of an illustrious career, to resist the persuasions of his king and to say, that when the cause was before him he would act as became a judge, and thus to lose the Chief Justiceship of England, but to gain legal immortality; that later, when England's liberties and ours were in the balance, led

Croker, upon the great issue of the legality of the ship money tax, to forget his interest, but to remember his country and to vote against the king. It was the legal conscience that in the darkest night of our existence, when madness ruled in the councils of the Nation, when it was proposed to govern sovereign States as subjugated provinces, when it seemed as if the landmarks of the Constitution were to be engulfed in the overwhelming flood of popular passion—it was the legal conscience that spoke like the voice of God from on high in the utterance of the Supreme Court of the United States, declaring that this government was still to be “an indestructible Union of indestructible States.”

The legal conscience!—true in purpose, eternal in essence; may it be quickened into sleepless activity; may it always be terrible as the Sword of the Spirit as it pierces to the marrow of private injustice or public wrong.

THE WEIGHT OF AUTHORITY.

BY JUDGE SELDEN P. SPENCER, OF ST. LOUIS, MO.

Mr. Toastmaster and Members of the Bar Associations of Arkansas and Texas:

With the recollection of the great honor which you did me today in electing me a member of your joint Association still filling mind and heart with joyful appreciation, I greet you on this happy occasion.

The bountiful feast of which we have partaken has left some of us in the condition of the boy at a Sunday-school picnic who had eaten and eaten until it seemed as if he could eat no more, and who, when a kind old lady came to him offering a large piece of chocolate cake, which he loved, replied to her: "Thank you, Mrs. Johnson, I will take it. I can still chaw some, but I can't swaller no more."

I have been somewhat at a loss to understand why it was, after all the addresses and papers on jurisprudence which we have heard during the day, that I should find upon the menu card the same subjects set down as the toasts of the evening, and I can only account for it on the classical and historic theory which Herodotus attributed to the Macedonians when he said that the Macedonians always considered important subjects twice—in the morning, and at night, in order that they might pass judgment upon them once when they were sober and once when they were drunk.

It is a great responsibility to address a company of lawyers at a banquet under the most favorable circumstances; but to address a joint banquet reminds one of the answer of Travers, who always stuttered, but who upon one occasion, when found in London late at night stuttering so that he could hardly be understood, replied to his friend who asked him, "Why do you stutter so much more in London than in New York?" "B-b-b-because it's a b-b-b-bigger city."

A proper regard for constituted authority compels me to say that the subject which has been assigned to me—Weight of Authority—shall now receive due consideration. I publicly declare that I believe in it, and that I approve of it, and that the language in which it is couched and the beautiful poem which follows it deserve respectful applause on every hand.

The poem, though unclassified in literature, is doubtless by the same author who gave to the world the following gem:

"I am a young girl from Arkansas,
I can saw as much wood as pa can saw,
I can drink like a fish,
I can do as I wish,
I can chaw as much 'backer as maw can chaw."

Having thus spoken of the subject assigned to me may I, fellow members at the bar, speak for a moment about something a little nearer my heart.

I have only two regrets tonight, one of them is that I was unable to be here at the opening session of this great convention, and the other is that the hour is drawing so near when we must separate. I am not like the servant girl in the employ of a friend of mine who had exasperated her mistress, and who was finally dismissed with the following charge: "Mary, neither I nor Dr. Cahey can stand you any longer. You can pack up your things and go tonight." The reply came back instantly: "Yis, Mrs. Cahey, I will go. Thank God, I kin go; God pity Dr. Cahey, who can't go."

If ever I have had any doubt about the desirability of holding a joint convention by the Bar Associations of two States, it has completely vanished before the brilliant illustration of its wisdom and its excellence as shown in the joint meeting which is now ending. The opening sessions of the meeting with their interesting addresses and able discussions have shown the foolishness of such criticism.

A farmer in my State bought a heifer, which he had to take home from the pasture where it was. He safely led it by a rope until he reached the bars, which needed two hands to remove, and for the moment he wound the rope around his leg while he held down the bars. The heifer became frightened and started up the road, and in about a quarter of a mile the rope broke and left our friend bruised and bleeding on the way. When neighbors came to pick him up they asked him why he tied the rope around his leg, and he replied: "I hadn't gone three rods before I seen my mistake."

We are enjoying tonight what is in many respects the most important part of the entire program, and what will be in the future the most productive of good in the administration of justice. I do not mean the food or drink which is so delightfully abundant,

though it is a great blessing to be able to eat and drink what you like.

We have a man in our city who had been put by his physician upon a strict diet, and who one night, when the longing for the things he used to enjoy was greater than he could stand, went to the telephone, and calling up whom he thought was his physician, commenced abruptly: "O, doctor, can't I eat some lobster tonight? I have not had any for so long." The sepulchral answer came back: "Eat what you like, young man, this is the St. Louis Coffin Company."

The chief result of these gatherings lies not in the learning or eloquence or research of the papers, great as these may be, but in the knowledge of and affection for our fellow members at the bar which we acquire in these meetings. Personal confidence in our brethren on the bench and at the bar is as essential in the due administration of justice as is a knowledge of the law. I don't mean that same kind of confidence in the bench which was exhibited by one of the rough riders who once telegraphed to his colonel who was then in Montana: "Dear Colonel: I have just been arrested for killing a man, and am in jail. Please send me \$200 for my defense." The money was sent, and in about two weeks the money was returned with a letter, which among other things said: "I thank you greatly for your willingness to help, but I don't need it now, as we have just elected our prosecuting attorney."

Confidence in one another comes from mutual friendship and acquaintanceship, and mutual friendship and acquaintanceship comes largely from such gatherings as this. We come here to know men not only as lawyers, but to know them as men. Unless the bench can depend upon the personal integrity of the bar, and unless the bar have confidence in the personal integrity of each other, the administration of justice becomes exceedingly difficult, if not impossible.

"What constitutes a State?

Not high-raised battlements nor labored mounds,
Nor cities proud, with spires and turrets crowned,
Nor broad-armed bays with sheltered ports,
Where laughing at the storm rich navies ride,
Nor starred and spangled courts
Where low-browed baseness wafts perfume to pride,
But men, high-minded men."

When we have learned to trust and love one another, when we

come to know each other as men, while the things about which we may differ in politics and in law will always exist, but there will, nevertheless, be constantly exemplified the beauty and the strength of friendship in the disagreement.

"These barristers strive mightily, but they eat and drink as friends."

No man can overlook the personal side of meetings like this. We heard yesterday a great paper on bribery—learned and convincing—but long after the paper may have been forgotten will we remember the heroic pluck of the author who refusing to yield to bodily weakness that would have stopped in terror many men, finished his paper and, as the Chairman of the gathering so well said, by the determined bravery of his action gave notice to the world that there was in him that which was bound to conquer in his righteous fight against evil.

I should have read the paper on the Ku Klux Klan with interest in any event, but the personality of the speaker, as well as the excellence of the paper, led even the Connecticut blood in me to wonder if I had not missed a lot of righteous fun in not having had the opportunity of joining that historic Klan and to half conclude that Colonel Crenshaw was right when he said that the Ku Klux Klan was the only "benevolent order" which he ever joined.

I can not refrain from saying that, learned and masterful as was the eloquent address of Justice Brewer this morning, yet, by the charm of his personality and the integrity of his character as a man, he has, in a single visit, done more than many a decision, however learned, could ever have done to break down barriers of prejudice and to increase our regard for that high court of which he is an honored member and which could not contain such men as he, were it not worthy of our unlimited confidence and our most profound respect.

Shall we not make much of the social side of these gatherings? That they may be opportunities where the young men shall come to know, as they need to know, the older men in the profession, and where the judges and men of riper years and experience shall come to know, as they equally need to know, the younger men of the profession who in a few short years will have both the clients and the honors which now they possess only in anticipation.

Above everything else, gentlemen, which I shall take with me from this great gathering—and there has been much of instruction and of interest in the educational part of your excellent program—will be the friendships I have formed and the recollection of the men I have learned to honor and to trust, which shall abide with me as an encouragement and delight as long as I live.

THE CERTAINTY OF THE LAW—IF ANY.

BY MR. L. H. MATHIS, OF WICHITA FALLS, TEXAS.

Mr. Toastmaster and Brethren of the Bar:

In this presence, one would not dare, even at this hour of the forenoon, to speak to a subject that had not been cautiously worded. Before this assembly of hair-splitting, distinction-drawing, dogma-challenging members of this double-barreled Association, I would hesitate, even at 2 a. m., to announce anything "for sure"; and in speaking to a collection of practicing lawyers upon "the certainty of the law," in order to keep down a tumult and a disturbance of the peace, I hasten to add the familiar, pet phrase of the trial judge, "if any."

The indispensability of these qualifying words to correctness of judicial speech and the frequency of their use in charges, must, by the way, excuse the young applicant for law license who, when asked to translate "*nisi prius*," promptly declared that it was French for "if any."

A long time ago, I read the epigrammatic statement, purporting to have been made by some conspicuous lawyer, that "The beauty of the law is the certainty of the law." For some time I have suspected the existence of a typographical error in the printing of that epigram, in the omission of a front syllable from the longest word in it. If, however, that statement was ever made and its author meant what he said, I am constrained to believe that the sentence was uttered by some persevering lawyer for the appellant, in the glad moment when a message announced that the court of last resort had reversed and rendered his case. Because I have never heard anything more from that fellow, I believe that his court of last resort must have granted the appellee's motion for a rehearing and affirmed the judgment. I rather hope it did, as a punishment for his getting prematurely gay and for promulgating a misleading doctrine.

The propagation of such a belief and an occasional reference by some didactic law professor to the "exact science" of the law, has frequently begotten hopes and expectations in our prospective clients which we have had to tenderly, yet firmly, shatter.

The farmer has come into our office and has told the story of an outstanding note, the consideration for which, he claims, has failed,

or of machinery which, he says, after a year or so's use, has failed to measure up to the representations and guaranty of the crafty vendor, and he has desired our advice and assistance in the preservation of all his constitutional rights.

With thoughtful mien and in measured accents we have depicted the enormity of the wrongs he has suffered or is about to suffer. We have then brightened up and have cheerfully announced to him that he was not without remedy, but that the law vouchsafed to him ample redress. We then stopped, for it was his next move; he didn't hesitate long: in a cold, calculating, metallic voice he inquired: "Will you take my case on the 'inshoreance'?" Think of it, my brethren! The sickening suggestion is thus made to us, as members of our noble profession, to become mere legal underwriters! Shall our glorious profession, with its superb past, be thus tainted with the degenerating mould of the age, and commercialized? Not much,—"if any"! Perish the thought! When the farmer observed our rising indignation at his question, he explained that he had heard a good deal about the certainty of the law and the science of the law, and that he did not understand why a lawyer could not know in advance just what judgment would be rendered in his case as certainly as he had figured out what was due him that morning on six dozen eggs that he had sold at ten cents per dozen. Then, you understand, we had to explain to him that our unwillingness to "inshore" his case was not due to the fact that we were uncertain as to what the law was, for there was no doubt about that, but that in these busy times, when dockets were crowded, our appellate courts handed down many ill-considered opinions and that we could not afford to "inshore" the clearness of their legal vision—the hazard was too great. Some years ago a lawyer in West Texas, because of his client's importunity, issued one of those policies of "inshoreance" on the latter's case. As is usual in such cases, the worst happened; the destruction was complete; there was no salvage. Afraid to trust himself to speak, the lawyer jammed his lid down over his ears and silently strode out of the courtroom and down the street of the little town, the veins of his neck strutted with boiling blood. His client, dejected and timorous, followed him afar off.

Finally the client ventured into his presence and falteringly said: "I thought you told me you had a cinch on winning that case." Turning upon him with a wildcat's ferocity the lawyer hissed: "How the blank did you expect me to win your dashity blank case, when the court wouldn't believe a dash word of my law and the jury wouldn't believe a blank word of your evidence?"

All of which, my brethren, reminds me of my text, "The Certainty of the Law, If Any." There may have been a time in the hazy past when there was some considerable certainty in the law, but it was before the happening of stenographers and typewriters—when opinions were hand-made rather than machine-made. In those old days, in writing an opinion, the judge was forced to take his quill in hand and, bending over his table with contracting brow and protruding tongue, laboriously spell out the words; the natural tendency was to greater care and accuracy and he was more likely to stay closer to fundamental principles.

Besides, his output of these hand-made opinions was only about one-tenth of the present output of his machine-made opinions, and therefore, in the olden times, his chance of keeping in line with established precedents and fixed principles was just ten-fold greater than it is today.

In these days of rapidly-shifting weight of authority, I fear there is getting to be more justification, especially in our inferior trial courts, of the cynic's old definition that, "the law is likely to be anything that is plausibly stated and vociferously maintained." The lawyer of today who seeks conscientiously in the trial of his cases to know "where he is at," is sorely perplexed. He feels that he is compelled to buy law books and the sleepless, persevering law-book man is ever with him, offering to sell them to him at an average price of \$1.00 per pound, with a slight reduction if he will buy as much as a ton. Unable to escape the strenuousness of the law-book man, the lawyer peones himself for the balance of his life by signing an order for fifty volumes of Cyclopedia and 150 volumes of Digest, and the books are put into his office. He begins to search for the law upon the controlling question in his most important case. He searches the pages of his Cyclopedia and his eye falls upon the announcement of the doctrine as he has hoped it was and which ought to win his case. He starts to note the authorities in his brief-book and at the bottom of this list of authorities he reads, "But see," and then follows a long list of authorities which utterly repudiate the doctrine he is trying to get established.

Discouraged, he turns to his new Digest and finds authorities cited from seventeen States, approving the doctrine that he is contending for, while immediately following, under the word "contra," is a collection of cases from twenty-one States. Of what practical value is his new library; he is afraid to take either his Encyclopedia or Digest to the courthouse on the trial of the case lest the inquisitive lawyer on the other side should discover that "contra" bunch of cases, and persuade the trial judge that they outweigh the first

bunch. More disheartened, he resolves to ascertain whether the question has ever been passed on by the Supreme Court of the United States—the greatest tribunal on earth. He finds that it has been squarely passed on by that court, four of the distinguished jurists dissenting, however, from the conclusions reached by the other five, in opinions that, in logic and perspicuity, rival, if they do not surpass, the opinions of the majority. In passing, let me say, let no lawyer, however, criticize the lack of unanimity of opinion among the members of an appellate court, State or Federal. Better that the law should ever be declared by a fractional majority of the members of our courts of last resort than that one iota of the independence or fearlessness of the individuals composing them should be sacrificed.

Reflection, therefore, upon the conditions I have briefly outlined, have convinced me of the accuracy of the statement of a prisoner I have heard of. It was in an East Texas county, where I was reared—more than a generation ago. The prisoner had been tried before Judge Morris for murder, had been convicted and his punishment assessed at death. The time came for him to be sentenced. A crowd gathered in the courtroom to witness the solemn scene. Judge Morris, a splendid man and judge, sought to make it as impressive as possible upon the prisoner and the spectators. Folding his hands upon his expansive abdomen, he descended at some length upon the majesty of the law, declaring to the prisoner that neither the jury nor the district attorney, nor the district judge, had anything personal against him, but they only desired to vindicate the majesty of the law and to demonstrate the certainty of the law, dismissing him with the statement that nothing remained for him to do but to make his peace with God. A few days later the jailer woke to find Carpenter gone, having left a note addressed to Judge Morris, which read: "Judge, the Majesty of your law is all right, but she is a 'leetle' shy on the certainty thereof."

To be sure, much that I have said questioning the certainty of the law, must not be treated as a criticism of law in the abstract, for I realize, of course, that much that is charged to the uncertainty of the law is really due to the uncertainty of fact, to which the law is applied. Speaking as a lawyer to lawyers, if I should speak to the subject of the uncertainty of the fact in a lawsuit I should feel justified in dropping the limiting phrase, "if any." In the trial of his case the lawyer is always more afraid of some mine or torpedo of unexpected fact exploding under his keel than of being shot to pieces by a 12-inch projectile of a judicial opinion.

The lawyer who is able to keep his ship afloat after one of these collisions with an unanticipated fact is the lawyer who complains least of the uncertainty of the law, and the name of his client is legion. In Texas, not many years ago, Mr. John Doe sued a telegraph company for \$1999.99, the actual monetary value of mental anguish sustained by him because, through the alleged negligence of said company, Mr. Doe failed to have promptly delivered to him a wire announcing the dying condition of his mother, and therefore failed to be with her in her last hours. The case went to trial; the jury were in the box; two well-fed, prosperous-looking attorneys acted as the representatives of the plaintiff. After the pleadings were read, Mr. Doe, the plaintiff, was called to the stand. After the preliminary questions as to his name, age, residence and occupation, one of the plaintiff's attorneys prepared to proceed with the sad business at hand; he put his foot on the soft pedal and pulled out the tremolo stop of his vocal organ, excited his lachrymose glands to acute activity, swallowed down his sobs, and mournfully inquired of his client: "Mr. Doe, what was your mother's name?" The witness hesitated: silence reigned: the hesitation continued: the stillness increased: a wave of color began to appear above the witness' collar and travel north; his eyes sought first the far-off horizon and then the ceiling of the courtroom; symptoms of amazement and consternation began to manifest themselves in the faces of the plaintiff's lawyer. Pulling himself together desperately, the plaintiff's lawyer said to his client-witness: "I mean, what was her given name?" The witness' condition became more pitiful and his lawyers' more palsied. Again, the witness' eyes swept the firmament and finally rested upon and became glued to the cracks in the floor, while eventually there were forced through his unwilling lips, the words, "I declare, I don't believe I know." Talk to me about mental anguish! I undertake to say that the pallid cheeks, the drawn nostrils, the hopeless light in the eyes of these erstwhile robust lawyers for the plaintiff presented such a picture of acute wretchedness that had the members of the Supreme Court of Arkansas looked upon it, their sheer humanity would have caused them to see the actual reality of acute mental suffering and would, I believe, have caused them to embrace the Texas doctrine of recovery for mental anguish.

Brethren, I have swept the circle and am back to the place of beginning, "the certainty of the law, if any."

HARMLESS ERROR.

BY L. H. MATHIS, WICHITA FALLS, TEXAS.

[At the request of the Texas members, the Publication Committee venture to add the response of Mr. Mathis to a toast at a banquet of the Texas Association in Sherman in 1905, but not obtained in time for publication in the Proceedings that year. This is inserted in deference to many inquiries by those privileged to hear it, who were anxious that it should be preserved.]

Mr. Toastmaster and Brethren of the Bar:

I lift my voice this morning to sing the praises of "Harmless Error," the refuge of the appellate court, the hope of the appellee, the despair of the appellant and the salvation of the trial judge. When we were boys, with the Catechism as our only authority, and when the judgment of the preacher was considered final, it was the accepted doctrine that error was error. There was no such thing even as comparative error. There was only one variety; its nature was inherently bad and its consequences invariably fatal, both in this vale of tears as well as on the plateau of eternity. A harmless error was as much an impossibility as a fangless spreading adder. After we had climbed ambition's ladder, and by the aid of a certificate from a kind commissioners court, and a light summer examination by a friendly committee of our local bar had broken into the ranks of the illustrious of earth, and after we were struggling with our first client up the steep path to an appellate court, we comforted ourselves and our dejected, though still confiding client with the assurance that our record was alive with errors—flagrant, horrid errors, hatched there by a heedless, not to say incompetent, trial court, and that in the white light that always surrounded a justice-loving, justice-doing, infallible appellate court, these reptiles could not fail to be discovered, and would be promptly exterminated along with the purported cause of action of the contemptible appellee and his smart Aleck attorney. Alas! Alack! Brethren, you all remember the occasion. In the pages, or rather in the solitary page, of the opinion in that case, we made our first acquaintance with this specimen of error, the harmless variety. The distinguished jurist, in writing his apology for an opinion, shamelessly admitted that he had discovered the errors, but, on a microscopical examination, had ascertained that they had

no fangs—the judgment was affirmed—all the judges present, and concurring.

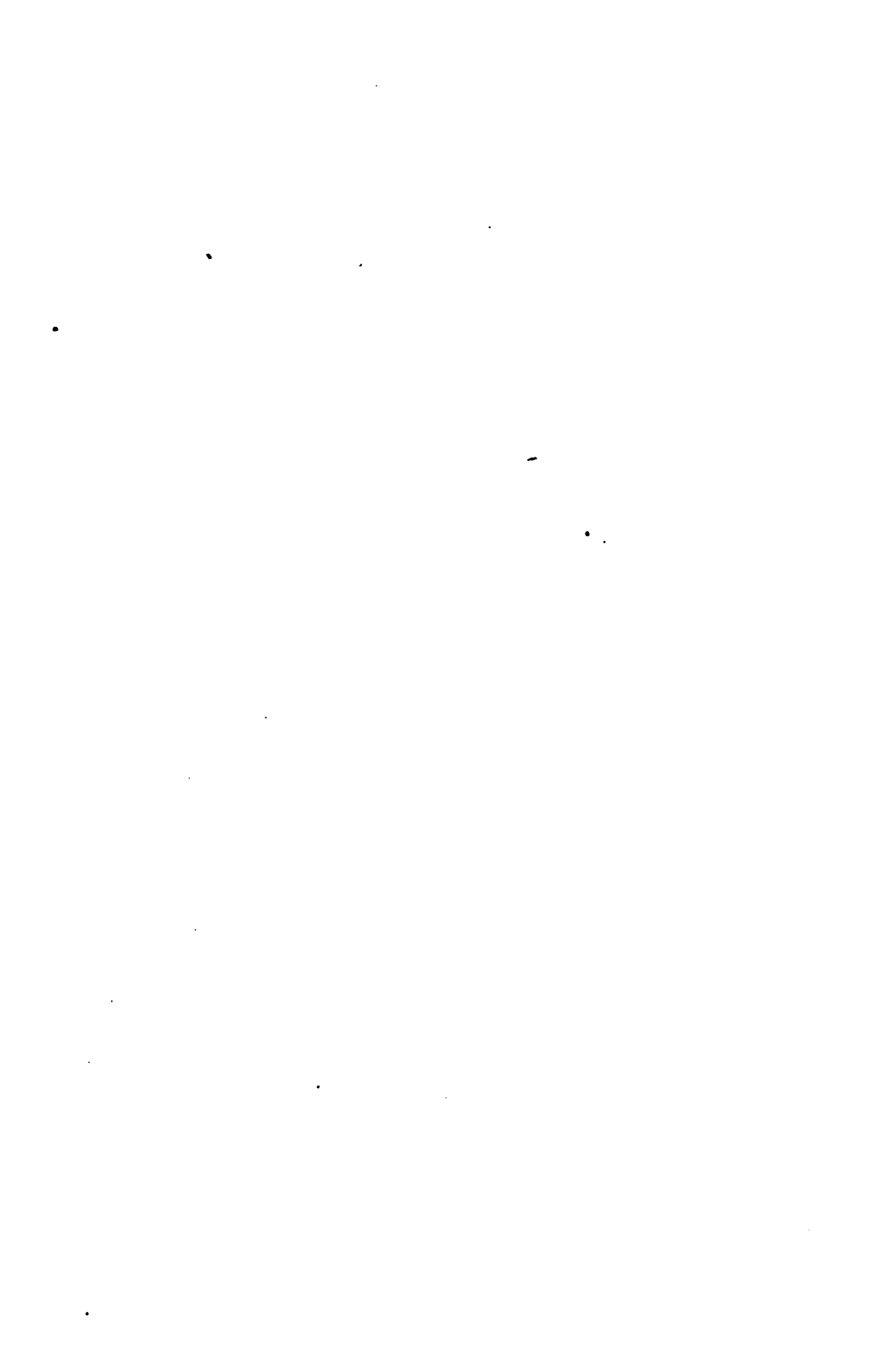
Realizing the deficiency of our earlier education, there remained nothing but to apply ourselves to the drawing of a new distinction, the distinction between error and harmless error. This distinction is not always easy to delineate; the keen eye of the expert is demanded, and whenever such an optic is noticed, we are accustomed to hang upon the shoulders of its owner the ermine robe of an appellate judge. Errorology has become quite a science, of which our appellate judges are its great exponents, though in Texas, at least, we are disposed not to agree with the disgruntled lawyer's definition of an appellate court as being a court which corrected the errors of others and adhered to its own. It not infrequently happens that this classification of "harmless" is announced in a most shocking manner.

In closing a case before that bulwark of the liberties of the people—the American jury—the unfair and "gougy" lawyer on the other side—by the way, did you ever notice that always it is the unfair and fudging lawyer that closes on you? I don't know how it is with the rest of you, but up in the precinct where my labors are largely confined, no lawyer ever closes a case on me who seems to have any conception of the term "fairness." At any rate, whenever one of this sort of lawyers "jabs" the poker of "dehors the record," heated to a white heat by his passionate imagination, clean through the quivering vitals of your unfortunate client and his case, then for an appellate judge (because the trial judge instructed the cruel gladiator to withdraw the smoking iron from your client's remains and he slowly does so) to hold that such an error was of the harmless species, is enough to tempt the lawyer to cease paying his occupation tax as a member of the noble profession. (From the kind reception this last sentiment has received by this company, I am inclined to think that appellant's counsel, who have been up against it, are largely in the majority here.)

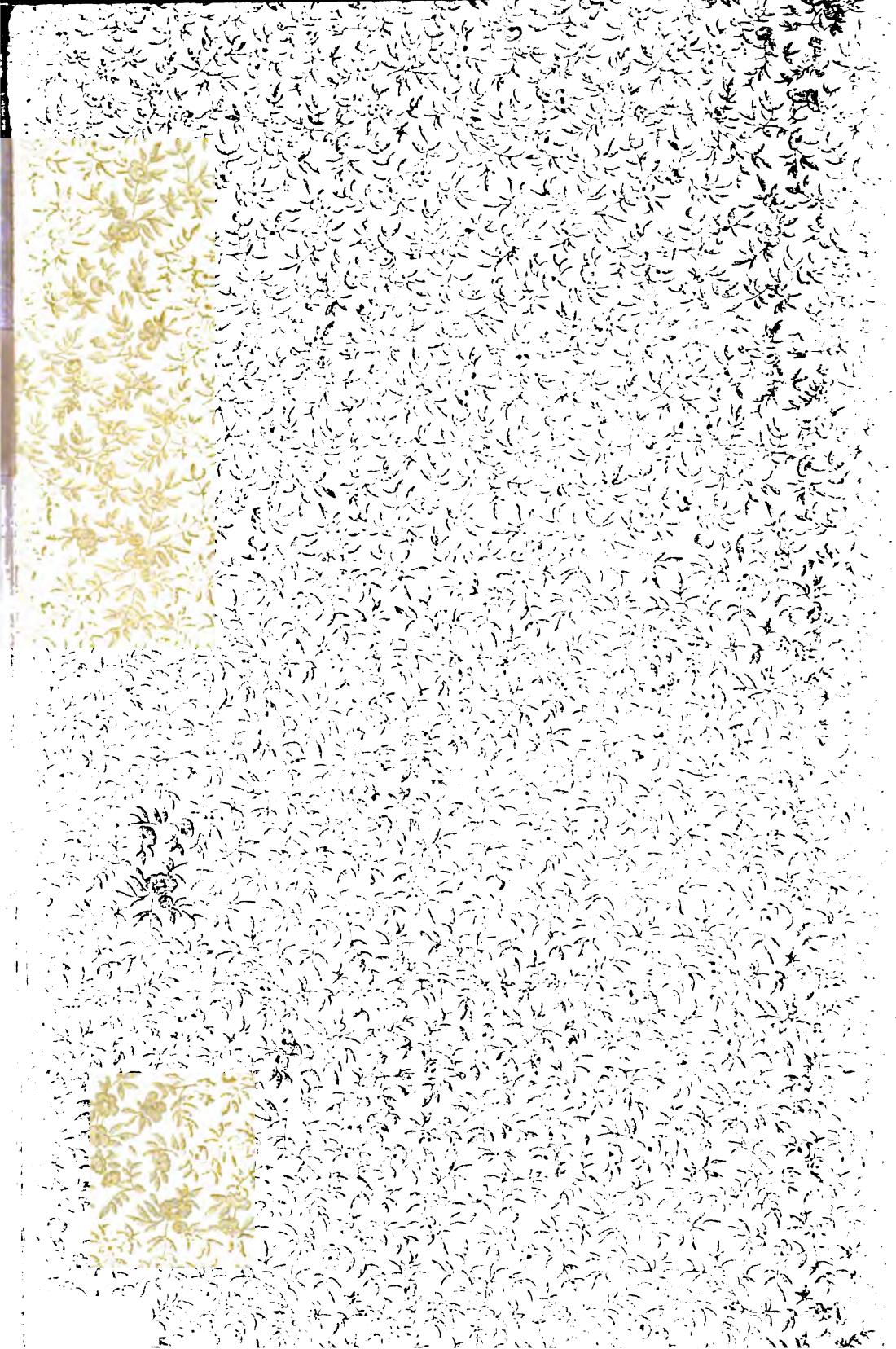
While this form of error is sometimes found in unexpected and out-of-the-way places, I have noticed, in going through the pages of our Reports, that you may always be advised of the presence of this variety of error by the occurrence in the opinion of an awkward, ill-featured word. A lawyer has a well-rounded, plump assignment, photographing an overgrown error of the most deadly species, as he thinks; he appears before the appellate court and excitedly points his finger at it, and almost hisses his denunciation of its viciousness. In its elaborate or at least lengthy opinion, the

court seeks to show that the appellant's lawyer is the victim of delusion; that his major premise is out of plumb, and his minor premise is wobbly and his conclusion impossible, and after reading the opinion over and over and not being altogether satisfied with it, the court adds the safety clause, "Anyhow, we think the error complained of, harmless." In picking your way through the brush of an opinion, just behind that stump, "anyhow," you can always find coiled up a big, fat, harmless error. Oh! the beautiful, fully-dilated assignments of error that have been punctured by that word "anyhow!" Whenever we run across it in an opinion, the rigors of approaching dissolution seize us, and subsequent verses of the opinion interest us no more. I regard it as the most fatal adverb in a lawyer's dictionary. But, I forbear, lest in this distinguished company the error of the "Board of Strategy," in assigning me a place on this program, shall not be classified as harmless. Let me finally express the hope that when our individual cases shall be finally submitted, and the clerk shall turn to the transcript of our lives and read therefrom the assignment of our many errors, the Supreme Judge of the Universe may, because of our Advocate, write into his opinion the words—"Anyhow, they were harmless."









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